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The Metropolitan Water District of Southern California

May 24, 1982

Clerk of the Supreme Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Dear Sir:

Arizona v. California, et al., No. 8 Original, October Term 1981

Enclosed are 11 copies of the Opinions of Solicitor Margold--1936, Solicitor Weinberg--1968, Associate Solicitor, Indian Affairs--April 12, 1974, and 11 copies of the Amended Complaint, Motion to Dismiss and Order thereon in The Metropolitan Water District of Southern California, et al. v. United States, et al., Civil Action No. 81-0678-GT(M), which we ask be lodged in the above-entitled action, with one copy of each being returned to me in the enclosed self-addressed stamped envelope as a conformed copy.

The Opinions of Solicitors Margold and Weinberg* are referred to in footnote 30 of the Brief of the State Parties in Support of Their Exceptions to the Report of Special Master Tuttle ("State Parties' Brief"). The Margold Opinion is referred to in footnote 22 and the Weinberg Opinion in footnote 23 of the Brief of the California Agencies in Support of Their Exceptions to the Report of Special Master Tuttle ("California Agencies' Brief"). The parties have requested that the Court take judicial notice thereof. The Associate Solicitor Opinion of April 12, 1974, is referred to in footnote 47 of the California Agencies' Brief and the Court has been asked to take judicial notice of the Opinion.

*The Weinberg Opinion refers to enclosures accompanying the Opinion. We have been unable to locate these items, but will lodge such enclosures with the Court if they become available.

1111 Sunset Boulevard, Los Angeles, Calif. / Mailing address: Box 54153, Los Angeles, Calif. 90054 / Telephone: (213) 626-4282

The pleadings in The Metropolitan Water District of Southern California, et al. v. United States, et al., which we have also enclosed, are referred to in footnote 41 of the State Parties' Brief and are also referred to in footnote 12 of the California Agencies' Brief. The Court has been asked to take judicial notice thereof.

Also enclosed for filing is the original and one copy of a certificate of service indicating that these documents have also been served upon the interested parties.

If you should have any questions regarding this matter, please contact me at your earliest convenience.

Very truly yours,

Carl Boronkay
General Counsel

Enclosures

cc: Per Certificate of Service

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M. 28198.

Roddis
Westwood
C. Crews

SOLICITOR'S OPINION

Re:

Did the agreement of December 4, 1893, as ratified by the act of August 15, 1894 (28 Stat. 332), extinguish the Indian title to the non-irrigable lands within the Yuma Indian Reservation.

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M. 28198.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON

Synopsis

He: 1. Held the agreement of December 4, 1893, as ratified by the act of August 15, 1894 (28 Stat. 332), extinguish the Indian title to the non-irrigable lands within the Yuma Indian Reservation.

2. Assuming that the possessory rights of the Indians in the non-irrigable land continued, is the tribe entitled (1) to the value of the land taken for a right of way for the All-American Canal located across the non-irrigable land of the reservation as established by Executive order of January 9, 1884 (2) to recover damages as a result of seepage and alkali, and to require a bond to insure prevention of, and payment for, such damage (3) to recover damages for failure of the canal (4) to the value of mineral deposits within the right of way (5) to payment for sand and gravel taken from the non-irrigable lands outside of the right of way and used for the canal or made non-usable by the construction of the canal (6) to require bridges over the canal to render accessible land and gravel deposits located on the non-irrigable lands and (7) to a royalty from the development of hydroelectric power.

Held: 1. The agreement with the Yuma Indians as ratified by the act of August 15, 1894, supra, extinguished the Indian title to the non-irrigable lands of the Yuma Reservation.

2. That the non-irrigable area will not become a part of the public domain until opened to disposition under the general land laws by presidential proclamation.

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3. That the claims asserted in behalf of the Indians, listed above under Nos. 1, 4, 5, 6, and 7, all of which depend for recognition upon the establishment of Indian title to the non-irrigable lands, cannot be sustained.

4. That the liability of the Imperial Irrigation District for damages occasioned by seepage, canal breaks, etc., (claims 2 and 3 above) depends upon the ordinary rules of negligence, and that the Secretary of the Interior is without authority to exact a bond from the District covering its contingent liability in this respect.

Noted
Ruben Taylor
Press Section

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UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Solicitor
Washington

M. 28194.

January 8, 1936

The Honorable

The Secretary of the Interior.

My dear Mr. Secretary:

You have submitted to me for an opinion two questions propounded by the Commissioner of Indian Affairs in his letter of October 2, 1935. The questions are as follows:

> "1. Did the Act of August 15, 1894 (28 Stat., 332), which ratified the agreement with the Indians hereinabove referred to, actually either in law or fact make the non-irrigable lands ceded by the Indians through the provisions of the agreement a part of the public domain so as to extinguish any right, title, or interest therein, legal or equitable, which may have vested in them?
>
> 2. Assuming that such legislation did not return the lands to the public domain, or did not extinguish such right, title, or interest, is there any reason why this Office is not entitled to request, for the benefit of the Indians, any or all of the various features set forth in our letter of May 10, 1935 to the Commissioner of the Bureau of Reclamation?"

The dispute which gives rise to these questions is due to the construction by the Bureau of Reclamation of the All-American Canal from the headworks at the Imperial Dam across the Colorado River at a point 12 miles upstream from the City of Yuma, Arizona, thence southwesterly on the California side of the Colorado River to the boundary line between California and Mexico. The All-American Canal in its course

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thus described crosses the length of the disputed Yuma Indian Reservation. The right of way for the canal was assumed by the Indian Office to cross Indian tribal lands for which compensation should be allowed and paid from the appropriation made for the construction of the All-American Canal. The claims for compensation and for guarantee against future damages from the operation of the canal are set forth in a letter dated May 10, 1935, from the Commissioner of Indian Affairs to the Commissioner of the Bureau of Reclamation. The claims are as follows:

"1. Value of Land

In accordance with the appraisal of October 29, 1934, the value of the lands occupied by the right-of-way through the Fort Yuma Indian Reservation and the cash remuneration due the Yuma Indians therefor is fixed at $8,602.50 on the basis of $1.50 per acre.

2. Damage as a Result of Seepage and Alkali

Providing seepage conditions on the Fort Yuma Reservation are aggravated or intensified by the All-American Canal, the District agrees to prosecute diligently the construction of such intercepting drains, installation of pumping plants including necessary transmission lines, or construction of such other works as are necessary to control underground water affecting the Indian irrigation project. The cost of operation and maintenance of such drainage works, including electrical energy if required, shall be borne by the District. If prior to the effective operation of such drainage works any Indian land is made unproductive by water logging, from alkali or other causes as a result of operation of the said canal, the Indian or Indians affected shall be compensated for losses suffered during the time such land is unproductive.

Damages, either temporary or permanent, to Indian land as a consequence of the operation of the All-American Canal shall

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be determined and payment made therefor at such time and ... such manner as the Secretary shall prescribe. A bond in the amount of $300,000 shall be furnished by the District to insure installation and operation of drainage works and payment of damages.

3. Damages Resulting from Failure of Canal

In the event of failure of the All-American Canal from any cause whatsoever resulting in damage or destruction of adjacent Indian lands and property, the Yuma Indians shall be reimbursed by the District for any and all damages resulting from failure of the canal. Such damage shall be determined and payment made therefor at such time and in such manner as the Secretary shall prescribe.

4. Mineral Deposits

If during the construction of the All-American Canal or at any time there should be discovered or encountered within the right-of-way any mineral deposits, either placer or ledge, of such value in the opinion of the Commissioner of Indian Affairs as to justify recovery, such mineral deposits shall be and become property of the Yuma Indians, and the Commissioner of Indian Affairs, in behalf of the Yuma Indians, shall make such arrangements as he may deem necessary and proper to recover such mineral deposits in such a way as not to impede or hinder the construction or operation of the Canal.

5. Sand and Gravel Deposits

The Yuma Indians shall be paid at the rate of 10¢ per yard for all sand and gravel taken from the Picacho Wash pit and the pits in Sections 19 and 24, for use on the All-American Canal Construction work and for any and all sand and gravel within economic limits of recovery in such pits made non-usable as the result of the Canal construction. The extent and value of deposits excavated out of the Canal and wasted or covered up, or otherwise made inaccessible shall be determined by a committee appointed by the Secretary, one member to be selected by the Yuma Indian Tribal Council, one member to be selected by the District and one to be selected by the other two members and payment therefor

shall be made in such manner as the Secretary may prescribe.

Bridges Across Canal

In order that the hill and mesa lands of the Indian Reservation, whereon are several extensive sand and gravel deposits of considerable value, may be accessible from the valley it is required that there be constructed, free of cost to the Yuma Indians, four bridges across the All-American Canal, located approximately as follows: (1) Picacho Wash, (2) NW¼, Sec. 16, T. 1[illegible] S., R. 22 E., (3) Sec. 24, T. 16 S., R. 21 E., and (4) Sec. 24, T. 16 S., R. 21 E., near Araz Junction. The definite locations for these crossings shall be selected by a representative of the Commissioner of Indian Affairs, when final location of the Canal, including location and type of appurtenant structures in the respective vicinities above mentioned are determined.

Hydroelectric Power Development

The contract of December 1, 1932, between the United States and the Imperial Irrigation District recognizes power possibilities on the All-American Canal and reserves to the District, subject to provisions for participation by other agencies, the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal below and not including the Syphon Drop site. Present plans contemplate the development of 30,000 KW at the Pilot Knob site in addition to a possible development of 5,000 KW at the Syphon Drop site, the latter being reserved to the United States.

The All-American Canal right-of-way through the reservation, accordingly is, in fact, a valuable power site. As one of the considerations for granting of the said right-of-way, it is believed the District should pay as rental for the use of all power sites along said canal within the reservation below Syphon Drop, annual charges in the amount of one dollar ($1) per horsepower of installed generator capacity, such payments for any power unit to be made for each calendar year from and after the first of January next following the date of which the unit is placed in commercial operation.

It is believed the Yuma Indians are likewise entitled to rental for the site at Syphon Drop. Since the power generated at this site is reserved to the United States the agreement will be necessarily between the Bureau of Reclamation and the Office of Indian Affairs and should contain the same provision for rental per horsepower per year of all generator capacity in addition to the present installed capacity of 1,000 KW."

After some negotiations between the bureaus, on July 15, 1935, the Commissioner of the Bureau of Reclamation advised the Commissioner of Indian Affairs that the land taken for right of way for the All-American Canal was not susceptible to irrigation, that title to non-irrigable land was vested in the United States by virtue of the act of August 15, 1894 (28 Stat. 332), that the land constituted a part of the public domain, and that, therefore, the Yuma Indians had no interest in the land.

On July 6, 1883, President Arthur by Executive order set aside a tract of country in the Territory of Arizona described by metes and bounds as beginning at a point in the channel of the Colorado River, opposite the mouth of the Gila River, thence up the channel of the Gila River to the range line between ranges 19 and 20 of the Gila and Salt River meridian, thence north on the range line to the first standard parallel south, thence west on the parallel to the Colorado River, thence down the channel of Colorado River to the place of beginning to be used as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon.

On the following January 9, 1884, by Executive order the President canceled the reservation in Arizona and created a reservation for the same Indians in California. This Executive order reservation on the California side of the river comprises the area which is the subject of this opinion.

The new reservation is described in the Executive order as beginning at a point in the middle of the Colorado River, due east of the meander corner to Secs. 19 and 30, T. 15 S., R. 24 E., S. B. M., thence west on the line between Secs. 19 and 30 to the range line between Rgs. 23 and 24 E., thence continuing west on the section line to a point, which, when surveyed, will be the corner of Secs. 22, 23, 26 and 27 in T. 15 S., R. 21 E., thence south on the line between Secs. 26 and 27 in said township to the intersection of the international boundary, thence easterly on the international boundary to the middle of the channel of the Colorado River, thence up said river in the middle of the channel to the point of beginning.

The area of the reservation was not changed until an agreement made December 4, 1893, at Fort Yuma, Arizona, between the Indians and three Commissioners representing the United States. These Commissioners were the representatives of the Office of Indian Affairs and the agreement made with the Indians was supposed to be for their benefit. The first paragraph of Article I of the agreement is as follows:

> "The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim, and interest in and to and over the following-described tract of country in San Diego County, Cal., established by executive order of January ninth, eighteen hundred and eighty-four, which describes its boundaries as follows: * * *" (Describes entire Yuma Reservation established January 9, 1884.)

Article II of the agreement provides, among other things, that

> "Each and every member of said Yuma Indians shall be entitled to select and locate upon said reservation and in said irrigable sections five acres of land, which shall be allotted to such Indian in severalty. * * *"

(The area in the irrigable allotment was increased to ten acres of irrigable land by the act of March 3, 1911 (36 Stat. 1065).)

Article III of the agreement provides for the allotments by a special agent appointed by the Secretary of the Interior and after all of such allotments have been made and approved "then all of the residue of said reservation which may be subject to irrigation shall be disposed of by the Secretary of the Interior by sale to white settlers at the appraised value of the land. (Emphasis supplied)

Article VI of the agreement provides that

> "All lands upon said reservation that can not be irrigated are to be open to settlement under the general land laws of the United States."

Article VII provides

> "There shall be excepted from the operation of this agreement a tract of land, including the buildings, situate on the hill on the north side of the Colorado River, formerly

> Fort Yuma, now used as an Indian school, so long as the same shall be used for religious, educational, and hospital purposes for said Indians, and a further grant of land adjacent to the hill is hereby set aside as a farm for said school; the grant for the school site and the school farm not to exceed in all one-half section, or three hundred and twenty acres."

By the act of August 15, 1894 (28 Stat. 332), Congress accepted, ratified and confirmed the agreement made with the Indians on December 4, 1893. The act also provided for expenditure of funds to carry out the terms of the agreement. It directed the Secretary of the Interior to allot the lands susceptible to irrigation until each and every Indian had received an allotment and to appraise and sell the remaining irrigable lands to white settlers. The following language of the act refers to the disposition of the nonirrigable lands:

> "That all the lands ceded by said agreement which are not susceptible of irrigation shall become a part of the public domain, and shall be opened to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws."

Pursuant to the act of June 17, 1902 (32 Stat. 388), the Bureau of Reclamation has constructed the Yuma Irrigation project. The diversion of water from the Colorado River was accomplished by the construction of the Laguna Dam located about eight miles upstream from the City of Yuma. The main canal carries the water from the California end of the dam to a point near Yuma where it passes under the river in a conduit. The position of the canal in California made

it possible to irrigate about 8,000 acres of land in the Yuma Indian Reservation. Approximately half of the area was used for Indian allotments and the remainder sold after appraisal to white settlers. This area, considerably reduced by seepage and other causes, now constitutes the Reservation Division of the Yuma project. After investigation and after topographical and subdivisional surveys of the reservation were made, an administrative determination fixed and designated the irrigable area and fixed and designated the area not susceptible of irrigation. Each of the Indians on the Yuma Reservation was allotted as directed by the acts of Congress of August 15, 1894, and March 3, 1911, supra, and the remaining irrigable lands were appraised and sold at public sale. However, at no time have the non-irrigable lands been opened to settlement and sale by proclamation of the President as provided in the above-quoted paragraph of the act of August 15, 1894.

It is reasonably evident, I think, that the non-irrigable lands did not become a part of the public domain at the time of execution and ratification of the agreement with the Indians. Article VI of the agreement merely says that all lands upon said reservation that cannot be irrigated "are to be open to settlement under the general land laws of the United States." The time of opening the lands to settlement is not specified, but some future date was apparently in contemplation, because no classification of the lands into irrigable

and non-irrigable had then been made and until there was such a classification the particular lands which were to be subject to settlement under the general land laws could not be identified. The ratifying act is more specific. It provides that the non-irrigable lands "shall become a part of the public domain, and shall be open to settlement and sale by proclamation of the President of the United States, and be subject to disposal under the provisions of the general land laws". The emphatic use of the future tense in this declaration is inconsistent with the view that the lands became a part of the public domain immediately, and bearing in mind that the words "public domain" or "public lands" are habitually used in Federal legislation to describe such lands as are subject to sale or disposal under the general land laws, (Newhall v. Sanger, 92 U. S. 761, 763; 10 L. D. 367) it seems that Congress intended that the non-irrigable lands should become a part of the public domain on the same date that they are made subject to settlement and disposition under said general land laws by presidential proclamation. In this view, the non-irrigable lands will not become a part of the public domain until such proclamation issues.

The fact that the non-irrigable lands have not yet become part of the public domain is not, however, decisive of the question at hand. The question is one of ownership as between the United States and the

Indians and this depends primarily upon the provisions of the agreement of 1893 as ratified by Congress. It is argued by the Indian Office that the non-irrigable lands have been continuously administered as a part of the Indian Reservation since execution and ratification of the agreement; that the lands have been leased for grazing and mining purposes; and that the proceeds from such leases have been covered into the Federal Treasury for the benefit of the Yuma Indians. But this administrative recognition of Indian ownership is not controlling (Harris v. Bell, 254 U. S. 103, 109; Tapp v. Stuart, 9 Fed. Supp. 23), and must give way if in conflict with the plain terms of the agreement and ratifying act. The provisions of the agreement and act received consideration in two cases decided August 2, 1935, in the district court of the United States in and for the Southern District of California. See United States v. Sid Johnson and Mrs. Sid Johnson; United States v. M. C. Walker and Mrs. M. C. Walker (unreported). These were ejectment suits brought by the United States against squatters on lands within the reservation which were susceptible of irrigation. While non-irrigable lands were not involved, the decisions interpreted the agreement and act as vesting full title in the United States immediately subject only to the rights specifically reserved in the Indians, which reserved rights, as will hereafter be shown, extend to the irrigable lands only. The inference to be drawn from

those decisions in so far as the non-irrigable lands are concerned is that the relinquishment by the Indians became effective immediately rather than at some future date, and this, I think, is the correct view.

Article I of the agreement declares that the Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title, claim and interest in and to" all of the lands within the reservation boundaries. This language imports in clear and precise terms a present relinquishment or cession of all of the interest of the Indians in the reservation lands. The relinquishment or cession is made subject to the conditions thereinafter stated, but those conditions in no way qualify the absolute nature of the relinquishment or cession with respect to the non-irrigable lands. The conditions materially affecting the relinquishment or cession have to do only with the irrigable lands, subjecting them to allotments in severalty to the individual Indians and sale for the benefit of the Indians as a whole. As to the irrigable lands, therefore, the cession or relinquishment was not absolute, but in trust for the use and benefit of the Indians. The beneficial ownership of the Indians in the irrigable lands thus continued notwithstanding the relinquishment or cession. See Ash Sheep Company v. United States, 252 U. S. 159. Neither the agreement nor the ratifying act, however, contains any word or clause qualifying or limiting the absolute cession

made of the non-irrigable lands by Article I of the agreement. Both recognize that those lands are to become a part of the public domain and be disposed of under the general land laws. The words "hereby surrender and relinquish", as applied to the non-irrigable lands, coupled with the declaration that such lands shall become a "part of the public domain" and "be opened to settlement and sale", without the reservation of any interest in the Indians and unaccompanied by any condition in the nature of a trust, express or implied, obviously import an absolute extinguishment of all the interest of the Indians in and to that class of lands. In such a situation, there is no authority to depart from the plain words of the agreement and act. In United States v. Choctaw Nation, 179 U. S. 494, the contention was made that a treaty, the terms of which made an absolute cession, should be interpreted to create a trust for the benefit of the Indians. The Court rejected the contention, saying among other things (page 535):

> "But if the words used in the treaty of 1866, reasonably interpreted, import beyond question an absolute, unconditional cession of the lands in question to the United States free from any trust, then the court cannot amend the treaty or refuse to carry out the intent of the parties, as gathered from the words used, merely because one party to it held the relation of an inferior and was politically dependant upon the other, or because in the judgment of the court the Indians may have been overreached. To hold otherwise would be practically to recognize an authority in the courts not only to reform or correct treaties, but to determine questions of mere policy in the treatment of the Indians which it is the function alone of the legislative branch of the Government to determine."

While the irrigable or non-irrigable character of the lands within the reservation had not been determined on the date of the agreement of relinquishment or cession, it is clear that the taking effect of the relinquishment or cession was not postponed until classification of the lands as non-irrigable. In this respect, the situation is closely analogous to that involved in the grants of swamp lands made to the States by the act of September 28, 1850 (9 Stat. 519). That act, like the agreement under consideration, was in the usual terms of a grant in praesenti, and there, as here, the character of the lands was determined at a subsequent date. The courts have uniformly ruled that the States became immediately invested with an inchoate title which became perfect, as of the date of the act, when the land was identified and the patent issued (see United States v. Minnesota, 270 U.S. 181, 203, 205). Applying a like rule here, the relinquishment of the Indians, as and when the non-irrigable character of the lands was determined, became fully effective as of the date of the agreement.

The case of United States v. La Champelle (81 Fed. 152), which has been called to my attention as supporting the claim of Indian ownership of the non-irrigable lands, is not in point. In that case, an agreement had been entered into between the Secretary of the Interior and Chief Moses, purporting to represent the Indians of the Columbia Reservation. Under the provisions of the agreement, the

Indians, in consideration of a sum of money, agreed to remove to another reservation and that the Columbia Reservation should be opened to settlement, except that any Indians who desired to remain might do so in which event lands not exceeding 640 acres to each family should be selected for them. The lands were thrown open to settlement before allotment selections had been made. The Indians who remained on the lands did not acknowledge the authority of Chief Moses to represent them. White men attempted to settle on the lands and were resisted by the Indians, whereupon the Indians were forcibly removed by the United States troops and imprisoned. During their imprisonment, the white settlers seized their improvements, settled on the land and filed homestead declarations which were first accepted and later canceled. Suits were then brought by the United States to oust the settlers from possession. The court ruled that the President was without authority to open the lands to settlement under the homestead laws until after allotment selections had been made for the Indians; that the opening of the lands was premature; that the lands had not become a part of the public domain; and that the Indians who remained on the lands were not bound by the agreement entered into with Chief Moses "for the reason that they never gave their assent, and Moses had no authority to represent them". This ruling is without application here for the reason, first, that there has been no premature opening of the lands in the Yuma Reservation to settlement under

the general land laws; second, no question is raised as to the validity of the agreement with the Yuma Indians; and third, the stipulations of the agreement have been carried out by the United States and the Indians have received and accepted the allotments and other benefits promised them. In this situation, the question -- and it is one upon which the decision in the La Chappelle case has no bearing -- is whether the Indian title to the remaining lands classed as non-irrigable has been extinguished. The plain terms of the Yuma agreement require that that question be answered in the affirmative.

It follows from what has been said that the claims asserted on behalf of the Indians and listed above under Nos. 1, 4, 5, 6, and 7, all of which depend for recognition upon the establishment of the Indian title to the non-irrigable lands, cannot be sustained.

Regarding the liability of the United States or that of the Imperial Irrigation District for damages caused by seepage, percolation, or breaks in the canal (see claim listed above as Nos. 2 and 3), the law does not make the concern engaged in the carriage of irrigation water an insurer of others against damage from breaking, overflow, seepage or other escape of the water. The famous English case of Rylands v. Fletcher (L. R. 3 H. L. 330), declared that a man builds a reservoir or other works to hold water at his peril. This is not the law in the West. The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence.

Heidelind v. Tuolumne, etc. Company (12 Pac. 307); Tulley v. Platt County (28 Pac. 129). In the operation of a canal the ordinary rule of negligence applies, namely, that there must be a failure to use the care which an ordinary prudent man would have taken under the circumstances. Parker v. Gregg (136 Cal. 413, 68 Pac. 22). Until the All-American Canal is completed and used, it will be impossible to tell whether seepage will result. A break in the canal might occur if unprecedented conditions arise. If actionable damages occur for any reason while the canal is being operated and maintained by the Imperial Irrigation District, a judgment against the District could be satisfied under the California laws. In the meantime, I do not think the Secretary of the Interior has any authority to require the District to give bond in the amount of $200,000 or in any other amount guaranteeing the contingent liability of the District. No statutory provision of which I am aware empowers the Secretary to exact such a bond. In the absence of such a statutory provision, the District cannot be compelled to give bond unless the obligation so to do is imposed by its existing contract with the United States under which the United States is constructing the All-American Canal for the District at the expense of the District. That contract, which fixed in detail the rights and obligations of the parties both before and after the District takes over the operation and maintenance of the canal, contains no provision

requiring the District to give bond, nor does it contain any reservation of power in the Secretary which may be invoked as authorizing him to exact a bond. The obligation to give bond, therefore, is one which the District has not agreed to assume and which cannot now, in view of the existing contract, be enforced without its consent.

Respectfully,

(Sgd) Nathan R. Margold,
Solicitor.

Approved: January 8, 1935.

(Sgd) T. A. Walters,
First Assistant Secretary.

IN REPLY REFER TO
F-66-1033.5323

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

JUN 2 2 1966

Memorandum

To: Secretary of the Interior

From: Solicitor

Subject: Status of Land in T. 16 S., R. 22 and 23 E., SBM Proposal for Lease to Yuma County, Arizona

I have completed my review of the status of certain land in T. 16 S., R. 22 and 23 E., SBM proposed for lease to Yuma County for park, airport and recreational purposes.

For convenient reference, the lands involved will be referred to as separate parcels. Parcel One consists of land in Sections 25 and 36, T. 16 S., R. 22 E. and in Sections 30 and 31, T. 16 S., R 23 E., SBM, lying between the upper reservation levee and the present Arizona-California State line. Parcel Two consists of lands in Section 36, T. 16 S., R. 22 E. and in Section 31, T. 16 S., R. 23 E., SBM, lying on both sides of the present channel of the Colorado River between the upper reservation levee and the abandoned 1953 channel.

For reasons hereafter set forth, I have concluded that the proposed lease is legally unobjectionable if Parcel One is excluded.

Both parcels are accretions to lands of the old Fort Yuma Military Reservation formerly within the Yuma Indian Reservation. The issue presented is whether the Quechan Tribe of the Fort Yuma Reservation thereby has such a beneficial interest in either parcel as to render its inclusion in the proposed lease legally inadvisable. Claims for compensation on account of both parcels are embraced within the action awaiting decision by the Indian Claims Commission entitled The Quechan Tribe of the Fort Yuma Reservation, California v. The United States of America, Docket No. 320.

By an act of August 15, 1894 (28 Stat. 332), the Congress ratified an agreement of December 4, 1893 with the Yuma Indians under which the Indians ceded, inter alia, all rights in the old military reservation lands in California to the thread of the Colorado River. In return each Indian was to be allotted a small tract of irrigable land out of the ceded lands. The ceded surplus irrigable land was to be sold for the benefit of the Indians. All of the ceded lands "not susceptible of irrigation" were to become a part of the public domain.

At the time the 1894 act was passed, it was contemplated that irrigation facilities would be constructed by a private company. That venture failed. Thereupon, in 1904 Congress made provision for the inclusion of the irrigable lands of the Yuma reservation in the Yuma Federal Reclamation project being undertaken pursuant to the then recently enacted Reclamation Act of June 17, 1902 (32 Stat. 388).

Section 25 of the act of April 21, 1904 (33 Stat. 224) stipulated that certain of the irrigable lands should be allotted to the Indians and the remainder of such lands were to be disposed of under the reclamation law, but with a surcharge for credit to the Indians. The 1904 act left unaffected the stipulation of the 1894 act that extinguished the Indian interest in any non-irrigable lands. Sol. Op. M-28198, January 8, 1936.

We have then a situation in which, if the 1893 agreement and the subsequent acts of 1894 and 1904 embrace accretions to the former reservation lands, to the extent that those accreted lands are themselves irrigable, the Quechan Indians would possess a beneficial interest in them. Conversely, whether or not the accreted lands are within the compass of the agreement and the statutes, the Indians have no interest in non-irrigable lands.

Since disposition of lands which are non-irrigable may be effected free and clear of any claims of the Quechan Indians, whatever may be the outcome of the proceedings in Docket 320 and any subsequent judicial review thereof, the question of irrigability is central to a determination of whether to proceed with the proposed lease.

The act of 1904, as above noted, provides for inclusion of the irrigable lands in the Yuma Federal Reclamation project. Consequently, irrigability is to be determined in accordance with the practices and standards of the Bureau of Reclamation.

By memorandum to you of April 3, copy attached, in pursuance of your request of March 22, the Commissioner of Reclamation reported that the lands included in Parcel Two are non-irrigable. 1/ Consequently,

---

1/ He reached an identical conclusion with respect to an additional parcel embraced in the proposed lease described as Lot 19, S.23, T.8S, R.23W. Since this land lies south of the abandoned 1953 river channel and did not accrete to the former reservation lands, its inclusion in the lease does not present any issue as to Indian claims.

inclusion of Parcel Two in the lease does not present any issue of Indian rights.

Parcel One is considered by the Commissioner to be irrigable. Consequently, if the position of the Quechan Tribe in Docket 320 is upheld, the Quechan Tribe would have an interest in its disposition. A disposition other than as provided in the 1904 act, particularly a disposal as under the proposed lease, would appear to be inconsistent with the Indian interest. That being the case, I cannot recommend the inclusion of Parcel One in the proposed lease.

In light of the foregoing, I recommend that:

(1) Yuma County be advised that Parcel One must be eliminated from the proposed lease, and that it be approved with that modification;

(2) The Indian Claims Commission and the parties in Docket 320 be advised respecting the irrigability determinations of the Commissioner of Reclamation in order that they may be given such consideration as may be warranted in that proceeding; and

(3) By your endorsement in the space provided below, you approve Commissioner Dominy's determinations of April 3, 1968.

Appropriate letters of notification to Yuma County, the Indian Claims Commission, the Department of Justice and the Quechan Tribe are enclosed for your use.

Solicitor

Enclosures

The determinations made by the Commissioner of Reclamation in his memorandum to me of April 3, 1968, are approved.

Secretary of the Interior

See attached list
for distribution

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
WASHINGTON, D.C. 20240

IN REPLY REFER TO: 420

APR 1 1968
SOLICITOR

APR 3 - 1968

Memorandum

To: Secretary of the Interior

From: Commissioner of Reclamation

Subject: Status of Land in Township 16 South, Ranges 22 and 23 East, SBM, Under Act of April 21, 1904 (33 Stat. 189)--Yuma Project

Responsive to your March 22, 1968, memorandum subject as above, a field review has been made of the lands discussed in Deputy Solicitor Weinberg's March 21, 1968, memorandum on the same subject.

On the basis of that review and an analysis of available land classification data, we find that land parcel one identified as Sections 25 and 36, Township 16 South, Range 22 East, and Sections 30 and 31, Township 16 South, Range 23 East, San Bernardino Meridian, lying between the upper reservation levee and the Arizona-California state line is irrigable. Land parcel two consisting of Section 36, Township 16 South, Range 22 East, and Section 31, Township 16 South, Range 23 East, San Bernardino Meridian, lying between the upper reservation levee and the present Colorado River channel was also examined. Although arable soil profiles are distributed throughout this parcel, the land is isolated, contains toxic salt concentrations, and is subject to flooding. Accordingly, parcel two is determined to be nonirrigable. The third parcel of land, lying south of the present Colorado River channel in the same sections as parcel two is also held to be nonirrigable. Land in parcel three has few, if any, arable soil profiles, and is characterized by high water tables, and toxic salt and alkali conditions. This parcel is only slightly above the present water surface of the river, and accordingly, is subject to flooding.

During the field examination, review was also made as to the irrigability of Lot 19, Section 23, Township 8 South, Range 23 West, Gila and Salt River Meridian, lying to the south of the abandoned 1953 river channel and included in the lease to the county.

Although soils making up the presently cultivated lands are arable, the parcel is determined to be nonirrigable due to probable frequent flooding, inasmuch as the land lies on the river side of the existing levee.

Please advise if we can be of further assistance in regard to these lands.

(SGD) FLOYD E. DOMINY

cc:
Deputy Solicitor
Assistant Secretary, Water and Power Development

Regional Director, Boulder City, Nevada
Regional Solicitor, Los Angeles, California
Associate Solicitor, Reclamation and Power

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 202

IN REPLY REFER TO:

APR 12 1974

Memorandum

To: Solicitor

From: Associate Solicitor, Indian Affairs

Subject: Boundary of the Fort Mojave Hay and Wood Reserve

I. Facts and Background

A. Statement of the Conflict

The Camp Mojave Military Reserve and the Reserve for Hay and Wood were established "for military purposes" by an Executive Order of President Grant, dated March 30, 1870. The two reserves are located on bottomlands of the Colorado River where the boundaries of the states of Nevada, California and Arizona come together. By an Executive Order dated September 19, 1890, both reserves were transferred to the Department of the Interior to be held in trust as a reservation for the Fort Mojave Indian Tribe. The boundary description of the two reserves as contained in the 1870 Executive Order and the 1890 Executive Order, is as follows:

> Camp Mojave--Commencing at a post marked "U.S." in mound of earth situated N. 83° 31' 37" E., 66.99 chains distant from the flagstaff at the post; thence variation

14° 08' 28" east, south 33° 08' 28" W., 240 chains to a post marked "U.S." in mound of sand; thence north 56° 51' 32" . 232.60 chains to a post marked "U.S." in mound of coarse gravel; thence north 33° 08' 28" E. 240.00 chains to a post marked "U.S." in a mound of coarse gravel, near the west bank of Beaver Lake; thence south 56° 51' 32" E. 232.60 chains to the point of commencement. The said boundaries containing 5,582 acres, 1 rood, 24 perches, a little more or less.

Camp Mojave Hay and Wood Reservation--Commencing at a post marked "U.S." in mound of earth situated south 10° 43' 41" E. 347.52 chains distant from the flagstaff at Camp Mojave and about 20 chains southwest from the point where the road crosses the top of the mesa; thence variation 14° 08' 28" east, south 1° 04' 28" W., 272.50 chains to a post marked "U.S." in a mound of earth near the quartermaster's corrall; thence south 76° 17' 28" W. 228.50 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence north 23° 01' 32" W. 362.70 chains to a post marked "U.S." in a mound of earth near the left bank of the Colorado River; thence south 88° 45' 32" E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less.1/

The present controversy concerns the western boundary of the Hay and Wood Reserve. The language of the War Department Order, relied upon in the Executive Order, describes the boundaries of each reserve in terms of courses and distances and by reference to the amount of acreage enclosed. Reference in each description is also made to posts placed at each corner. In the case of the Hay and Wood Reserve, the reference to the posts marking the western border locates them as being

"near the left bank [or east bank] of the Colorado River." But the existence of this reference creates an inconsistency in the description; if the courses and distances and acreage specified in the order are followed, the western boundary of the Reserve must necessarily be located west of the flood plain of the Colorado River.

The Fort Mojave Tribe and the Bureau of Indian Affairs construe the order as locating the reservation boundary west of the Colorado River.2/ The Bureau of Land Management interprets it as creating the river as the reservation's western boundary.3/ At issue between the Indians and BLM is the equitable ownership to approximately 3500 acres of land. This issue has not been definitively resolved between the respective Bureaus, and conflicting interpretations and actions have persisted over the years. Accordingly, I recommend that this matter be submitted to the Secretary for final determination.

I have carefully reviewed the factual background of this long-standing controversy and have considered the pertinent legal principles. I recommend that the Secretary issue an order recognizing the equitable title of the Fort Mojave Tribe to the full 9,114.81 acres specified in the 1870 order. The reasons for my recommendation follow.

I. Wheeler Survey

Prior to issuance of the 1870 executive order, the area which became the Hay and Wood Reserve was surveyed by Lieutenant George Wheeler of the U.S. Army.3a/ Lt. Wheeler spent two days surveying the Hay and Wood Reserve in January 1869, and he took notes of his survey.3b/ During the same general period, and in rapid succession, Wheeler also surveyed over a dozen other military reservations in the area.

Thirteen months after his survey was completed,4/ Lt. Wheeler and an assistant -- Mauran -- drew a map depicting the Hay and Wood Reserve. The map was drawn in San Francisco using Wheeler's notes. The 1870 map depicts the boundaries of the Hay and Wood Reserve, and it shows the Colorado River as running along the western boundary of the reserve. Its dimensions, however, and its relationship to Fort Mojave are scaled to conform to the courses and distances and the acreage specified in General Order Number 19. The map therefore depicts a physical impossibility, since a reserve of the dimensions portrayed and traced out at the indicated latitude and longitude could never have been established east of the Colorado River.

Little is known of the circumstances surrounding the actual drawing of the 1870 Wheeler map. The map was drawn by

J. R. Mauran, one of Wheeler's assistants, and it is signed by Lt. Wheeler. Any records describing the creation of the map were probably lost in the San Francisco earthquake. However, it seems likely that the map would have been drawn by reference to Wheeler's notes and to whatever maps the Army Headquarters had at its disposal in San Francisco at that time. All of the maps available to the Army command in San Francisco in 1870 contained erroneous locations of the Colorado River.5/ Hence, the most likely explanation of the 1870 Wheeler map is that Wheeler's survey notes were traced onto a map that erroneously located the Colorado River west of its true longitude.

2. The 1870 Order

The boundary descriptions of the two Fort Mojave reserves appeared first in a communication from the Headquarters of the Military Division of the Pacific in San Francisco to the Adjutant General of the U.S. Army in Washington, D. C.6/ The letter is dated March 12, 1870, and describes eight separate reserves that were surveyed by Wheeler during his assignment in 1868 and 1869. It recommends that all eight be formally sanctioned as military reserves. President Grant's March 30, 1870, Executive Order adopted the descriptions of the reserves therein without change. Since the letter was written after the 1870 map was drawn, the most reasonable conclusion is that the reference to the

left bank of the Colorado River crept into the description at this point. The letter is signed by Major General George Thomas, not by Lt. Wheeler; it is probable that he or his aide inserted the reference to the river in the boundary description after studing the faulty 1870 Wheeler Map.

3. The 1890 Transfer of the Reserve to the Department of the Interior

When the two reserves were transferred to the Department of the Interior in 1890, no new survey was ordered. The Executive Order of September 19, 1890, merely approves the recommendation of the Acting Secretary of War 7/ which recommended that "the Military Reservation of Fort Mojave, Arizona, be transferred and turned over to the Department of the Interior for Indian school purposes". Hence, the cartographic error created in February 1870, received formalization as an executive order in September 1890. The latent ambiguity contained in the Executive Orders went undisvoered until 1903.8/

4. Subsequent Administrative Actions

Since 1903, however, the inconsistencies in the reservation's boundary description have been recognized by agencies of this Department.9/ In that year, the Geological Survey

requested a clarification of the boundary question prior to completing official maps of the area.10/ The BIA responded that the boundary was the Wheeler Line in the western foothills, regardless of the true position of the Colorado River in 1869 or in more recent times.11/ The General Land Office apparently took a contrary position, as it ordered a resurvey of the reservation in 1905. The special instructions issued by the Surveyor General to John Fisher, the surveyor, told him to survey the east, and south boundaries of the Hay and Wood Reserve and to treat the Colorado River as the western boundary of the entire reservation, including Camp Mojave, the Hay and Wood Reserve and the Intermediate tract.12/ [No official plat was prepared adopting this survey. The 1905 survey is significant, however, in that it confirmed the location of the flagstaff used by Wheeler.]

The General Land Office conducted another survey in 1928. The instructions to Surveyor Sidney Blout prejudged the issue in dispute: Blout was directed to determine where the Colorado River flowed in 1869 and establish the western boundary of the Reserve in a line along the eastern bank of the old river course.13/ Blout resurveyed the Hay and Wood Reserve accordingly, and the resultant official plat was adopted by the General Land Office in January 1931.

Several aspects of the Blout survey deserve mention. The new plat reduces the size of the original Wheeler plat by 3,500 acres, which is in excess of 33 percent of the originally specified 9,114.81 acres. Secondly, the courses and distances for the Blout plat do not correspond to those of the Wheeler plat. Thirdly, the truncated Hay and Wood Reserve does not stand in the same relation to the Fort Mojave Military Reserve as did Wheeler's Hay and Wood Reserve. Hence, the Blout survey created a reserve that is substantially different from that described in the Order of 1870.

In 1941, the GLO ordered another survey of the lands that were removed from the Hay and Wood Reserve by the Blout Line.14/ These lands were accordingly surveyed and subdivided by Vander Meer and thereafter, as part of the public domain, awaited disposal under the various public land laws.

Other agencies have accepted the BIA position. The U.S. Geological Survey has subsequent to the 1928 survey treated the western boundary of the Reserve as extending beyond the Colorado River; the 1950 Needles Quadrant of California and Arizona map clearly identifies the full 9,114.81 acres as an Indian reservation.14a/ More recently, the United States took the position before the Supreme Court in Arizona v. California (No. 9 Original, October Term 1959) that "the specification in the Executive

boundaries defined by courses and distance is controlling."15/ This case was commenced to allocate the waters of the lower Colorado River between the states of that region. The United States as a party claimed water rights for federal lands in those states, including the Ft. Mojave Indian Reservation. This required the Special Master to hear evidence as to the size of the Hay and Wood Reserve. While the Special Master held against the contention of the United States on this point and concluded that the 1928 General Land Office survey correctly determined the western boundary of the Hay and Wood Reserve,16/ the Supreme Court rejected his holding on the grounds that it was unnecessary for resolution of the case. Arizona v. California, 373 U.S. 546, 601 (1963). Instead, the Court used the lesser acreage of the Blout Survey for determining the tribe's water allocation, subject to enlargement if the boundary dispute were subsequently resolved in the tribe's favor. 376 U.S. 340, 345 (1964).

The Secretary has not approved the plats created as a result of the Blout survey. In May, 1957, however, the Secretary did approve the Constitution and Bylaws of the Ft. Mojave Tribe, which provide as follows (Article II): ". . . The authority of the Fort Mojave Tribe shall extend to the following land areas:. . . . the so-called Hay and Wood Reserve. . . containing approximately 9,114 acres, more

or less. . ." place substantial weigh on this action by the Secretary (as did the United States in its brief in Arizona v. California,17/). His approval of the tribal constitution and bylaws is neither a ministerial nor an incidental action -- it is required by statute 18/, indicates his non-acceptance of the 1928 survey and a contrary administrative interpretation of the 1870 Executive Order, and in my view supercedes the 1931 GLO approval of the Blout survey because that survey is incompatible with the tribe's constitution and bylaws.

II. Legal Analysis

The legal question to be resolved concerns interpretation of the intent of the 1870 and 1890 executive orders. That intent, it clearly appears, was to create a reserve as surveyed by Lt. Wheeler. I conclude from a detailed analysis of Wheeler's notes and techniques, as follows, that Wheeler surveyed a reserve of 9114 acres, and that the 1870 order intended to establish a reserve of that size. Accordingly, the courses and distances plus the acreage description better describes the intent of the order than does the call to monuments.

A. The Intent of the 1870 Order

Clearly, the drafters of the 1870 order intended to create a reserve as surveyed by Lt. Wheeler. The most likely conclusion - based upon Wheeler's notes, his surveying

techniques and the terrain of the area - is that Wheeler did survey a 9,114.81 acre reserve that spanned the Colorado River.

This conclusion is further substantiated by independent evidence of the understanding in the local community at the time as to where the boundaries of the reserve were. There is correspondence from 1872 referring to timber taken from that portion of the reserve lying west of the Colorado River.18a/

Wheeler's notes taken on the scene at the time when the survey was made, describe the terrain and his techniques, and preserve his crucial notations. At least some of these notes have been recovered from the National Archives and have been thoroughly studied and analyzed. Wheeler's survey technique was to establish corner posts for the reserve and then to determine a course and distance description for the reserve. His determinations were made by taking sitings to the corners from two different points outside the reserve through an instrument from which angular readings could be obtained. Using the angles so read, distances and acreage could be accurately determined by trigonometry.19/

In his notes for the Hay and Wood Reserve, Wheeler describes the establishment of Corner I and the two surveying stations for taking sites to the corners.20/ The actual readings for the sitings from one of these stations to Corners II, III, and IV are recorded. The readings from the other station are not included.21/ There is no description of the location of the Colorado River in relation to the corners, nor is there a description of the land in the vicinity of Corners III and IV.

In the vicinity of the Hay and Wood Reserve, the Colorado River flows through an alluvial plain approximately five miles wide.22/ The plain, or bottomlands, are rich in vegetation. On either side of the plain, the terrain ascends several hundred feet to a sandy, barren plateau. Moving away from the river, the plateau ultimately gives way to rocky foothills and mountains. In contrast to the bottomlands, vegetation on the plateaus and foothills is sparse or non-existent.

Lt. Wheeler established stations from which to survey the Hay and Wood Reserve on the barren plateau to the east of the alluvial plain.23/ Looking west from these points, he sited his instrument at three different corners and recorded the angles to each. Two corners, Numbers III and IV, were marked by fires. The third, Corner II, was marked by a flag.

To establish Corners III and IV as advocated by the BIA, Wheeler's men - but not necessarily Wheeler or Mauran--would have had to cross the Colorado River. The river is not, however, visible from the siting stations on the eastern plateau but is concealed by the dense foliage that carpets the bottomlands. It is probable that Wheeler himself never approached the river in the vicinity of the Hay and Wood Reserve, and that he therefore had no personal recollection of its location.

Corners III and IV were not chosen arbitrarily. While there is no proof as to what caused the selection of these spots, the two points are logical locations for surveyors using Wheeler's techniques. Both points are high enough above the flood plain to make possible their use as siting points. Corner III is 120 feet above the flood plain; Corner IV is 320 feet above the flood plain. Here it must be pointed out that, when siting to fires, it is necessary that the base of the fire be visible in order to obtain an accurate reading.24/ If, instead, fires had been lighted on the east bank of the river, they would have been hidden from the sight of one standing on the eastern plateau. In addition to being of proper height, both corners can be aligned with an identifying feature of the terrain. A line from Corner III through Corner II is in alignment with Boundary Cone, a prominent peak to the east long used as a natural landmark. Corner IV is due west of the Corner I, and, similarly, a line from Corner IV through Corner I is also in alignment with Boundary Cone. A line between Corners III and IV, while enclosing some uplands, is set far enough west so as to include a bulge in the bottomlands. It is no further west than necessary to include all of the bottomlands located between the north and south boundaries of the Reserve.25/

Wood Reserve mo probably went as follow 26/ Wheeler and his party went south of the fort along an established road on the plateau to the east of the river. At a point where the road began to descend the plateau into the river's bottomlands, Wheeler established his first siting station. From there and a second nearby station, he took sitings to the flagstaff at the fort in order to establish his position. He then measured off a distance of 24 chains down the plateau and into the bottomlands to establish Corner I. He then returned to the plateau and established a third siting station. Next he sent some of his men across the river to set up fires at what would become Corners III and IV. His men were to locate Corners III and IV by reference to Corners I and II and to natural terrain features. Wheeler then took readings to Corners II, III and IV from stations 2 and 3. Subsequently, he compared readings taken at Station 2 (of which there is no record) to readings taken at Station 3 and, using trigonometry, computed the courses and distances contained in the boundary description.

The available evidence supports this conclusion. The plateau and the road in the vicinity of Corner I have been located and they conform to the sketches in Wheeler's notes. The original flagstaff at Fort Mojave was relocated by the 1905 Fisher survey. Using the readings in Wheeler's notes,

his siting stati s on the plateau can be r stablished by reference to the flagstaff. Sitings from these stations to Corners II, III, and IV conform to the readings in Wheeler's notes.

A BIA survey team using modern intrumen's has resurveyed the reserve following Wheeler's notes.27/ The resultant plat is identical to the plat on the Wheeler map, and angular readings and terrain features correspond to those in Wheeler's notes. The acreage within this plat is 9114 acres.

B. The Call to Courses and Distances Plus Area Should, In these Circumstances, Prevail Over The Call to Monuments

While it is true that a call to monuments in a boundary description should generally prevail over courses and distances, the latter must prevail over monuments in cases where the courses and distances better indicate the intent of the grantor.28/ As the Supreme Court has stated:

> It is true that, as a general rule, monuments, natural or artificial, referred to in a deed control, on its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it. For instance, if the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify and render certain the land which the sheriff intended to convey, it would certainly be absurd to retain the false call, and thus defeat the conveyance. (Emphasis supplied.) White v. Luning, 93 U.S. 514, 524 (1876).

Continuing, the Court noted:

> "It would therefore be manifestly wrong, not to say absurd, to retain the call for the fence, and reject the call for course and distance. The reason why monuments, as a general thing, in the determination of boundaries control courses and distances, is, that they are less liable to mistakes; but the rule ceases with the reason for it. If they are inconsistent with the calls for other monuments, and it is apparent from all the other particulars in the deed that they were inadvertently inserted, the reason for retaining them no longer exists, and they will be rejected as false and repugnant." (Emphasis supplied)

Other courts have held that preference for monuments cannot be applied where the existence of the monument cannot be established and proved. Hanson v. Red Rock, 4 S. Dak. 358, 57 N. W. 11 (1893). Further, where the monument referred to is a natural object and its position or shape has changed over time, the boundary described by courses

and distances and acreage should prevail. Smith v. Hutchison, 104 Tenn. 394, 58 S.W. 226 (1900). See also Luginbuhl v. Hammond, 179 Cal. App. 2d 350, 3 Cal. Rptr. 582 (1960).

In this case, none of the posts referred to as monuments in the 1870 Executive Order has ever been discovered and the Colorado River is a natural monument which has undergone radical changes over time.29/ The rules of comparative dignity of calls in a boundary description are rules of construction adaptable to the circumstances and the intention of the conveying instrument. United States v. Redondo Development Company, 254 Fed. 656 (8th Cir. 1918); Ewart v. Squire, 239 Fed. 34 (4th Cir. 1916). They are not to be applied so as to defeat the intent of the grantor. White v. Luning, 93 U.S. 514 (1876).

The intent of the 1870 Executive Order is clear upon reference to the specification within the Order of a total quantity of 9,114.81 acres. When there is doubt of its true description, designation of quantity may be properly considered, Chapman & Dewey v. St. Francis, 232 U.S. 186, 197 (1914). Field v. Columbia, Fed. Case No. 4764, 4 Sawy. 523 (1864). And it may have controlling weight, particularly if there is uncertainty in the specific description. Montana Mining Co. v. St. Louis Mining & Milling Co., 183 Fed. 51 (9th Cir. 1910).

17 18

The Supreme Court in Ainsa v. United States, sustained the all-controlling factor of intent saying:

> So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain. 161 U.S. 208, at 229 (1895).30/

Nor does the addition of the words "more or less" detract from the significance of the specification within the Executive Order of a quantity of 9,114.81 acres. Used in connection with quantity, these words are merely words of safety and precaution, intended to cover some slight or unimportant inaccuracy. 6 Thompson on Real Property, Sec. 3353. The Supreme Court has specifically rejected the words "a little more or less" when used in a grant which clearly expresses the quantity. United States v. Fossat, 61 U.S. (20 How.) 413, 427 (1957).

In interpreting the Executive Orders of 1870 and 1890, moreover, any ambiguities should be construed in favor of the Mojave Indians. It is well settled that in any treaty or agreement with an Indian tribe, ambiguous language is to be construed in favor of the Indians or as the Indians would have understood it. Alaska Pacific Fisheries v. United States, 248 U.S. 78 (1918); Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970).

Nor is this rule of construction strictly limited to interpretations of treaties. The Supreme Court has stated in a case involving an executive agreement:

> "But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases." Choate v. Trapp, 224 U.S. 665 at 675 (1912).

The same rule applies when construing statutes that apply to Indians. Menominee Tribe v. United States, 391 U.S. 404 (1968); Squire v. Capoeman, 351 U.S. 1 (1956); United States v. Santa Fe Pac. R., 314 U.S. 339, (1941); Bennett County v. United States, 394 F. 2d 8 (8th Cir. 1968); Drummond v. United States, 131 F.2d 568 (10th Cir. 1942).

Reid Peyton Chambers
John Wyeth Griggs
Santa Fe

Copy to:

Mr. Lindgren
Mr. Striegel
Commissioner Thompson
Mr. LaFollette Butler
Mr. Veeder
Mr. McHale

1/ The 1870 Executive Order included within the military reserve:

> "The intermediate tract lying between the Hay and the Post Reservation, bounded on the West by the Colorado River and on the East by a line running from Station 1 of the Hay and Wood Reserve to Station 1 of the Post Reserve."

Inadventently, this intermediate tract was not expressly transferred by the 1890 order. It was, however, specifically included within the Ft. Mojave Indian Reservation in 1903. Executive Orders Relating to Indian Reservations: From May 14, 1855, to July 1, 1912, p. 12 (1912).

This "intermediate tract" clearly belongs to the tribe.

2/ Memorandum, March 14, 1973, BIA Area Director Phoenix to Commissioner, Indian Affairs; Memorandum, August 28, 1973, Assistant to the Secretary for Indian Affairs to the Solicitor.

The efforts of the Mojave Tribe to have their equitable title to this land recognized have been of long standing. Beginning in 1910, the State of California petitioned the General Land Office to obtain title to some of the bottomlands located on the western bank of the Colorado River and within the Hay and Wood Reserve as claimed by the tribe and BIA. The state claimed these were public lands, and subject to claim by it pursuant to the Swamp and Overflowed Lands Acts of 1850 and 1866. 43

U.S.C. § 987. While the state's petition was rejected in 1910, because GLO acknowledged the western boundary of the reservation was unsettled, the State reasserted its claim after the 1928 Blout survey. This led ultimately to an administrative adjudication in which the Tribe intervened. 8 IBLA 164 (1972).

The results of this determination are inconclusive for present purposes. The Board held against the State on the ground that the lands were not "swamp and overflowed" lands under the act; but did not pass on the tribe's claim to equitable title. The BIA, however, resurveyed the land and its expert witness, Rupkey, testified in the tribe's behalf at the hearing. His testimony is referred to in the footnotes herein as "Rupkey Testimony."

3/ The latest memorandum espousing this position is from Clark L. Gumm to Members of the Fort Mojave Task Force, dated May 18, 1971.

3a/ The lands within the Mojave Valley, including the lands presently in dispute, were part of the lands aboriginally possessed by the Mojave Tribe, and were held by the tribe in "Indian title." 7 Ind. Cl. Comm. 219, 253.

3b/ Lt. George M. Wheeler, Survey Notes 1868-1869, Books Nos. 2, 10, National Archieves, Record Group 77, Records of the Office of the Chief of Engineers.

4/ During these thirteen months, Wheeler was occupied on a grueling exploratory mission in southern Nevada unrelated to his surveys in 1868 and early 1869. William H. Goetzmann, Exploration and Empire (Alfred A. Knopf 1966), p. 399, 468.

5/ The maps of the Lower Colorado River available in 1870 to the creators of the Wheeler Map were all slightly erroneous. Three maps known to have been available to the Army in San Francisco at that time have been recovered from the National Archives. The first is the result of an 1855 survey of the Second Standard Parallel North in California by Henry Washington. This line runs east and west terminating in the vicinity of Corner IV of the Hay and Wood Reserve. It is known that Mr. Washington used a defective surveyor's chain so that all his measured distances were reported too short. Rupkey Testimony supra, Tr. p. 1394. Hence, in reporting the location of the Colorado River, Washington locates it two and one-half miles west of where it actually was in 1855. This would place the river where it never could have been in the foothills west of the alluvial plain.

An extensive fi d survey of the Lower Co orado was undertaken by Lt. J. C. Ives in 1858. Goetzmann, Army Exploration In the American West, 1803-1863 (Yale 1959), p. 380-393. The National Archives contains two maps that were prepared as a result of this survey. The first map, known as the Ives-Churchill map, was not published as part of the Ives report. It does, however, locate the Colorado River approximately one and a half miles west of its true location. Rupkey Testimony, supra, Tr. p. 1394. See also Memorandum from Clark L. Gumm to members of the Fort Mojave Task Force, May 18, 1971 (hereafter "BLM Memorandum") p. 5; State of California, 8 IBLA 164, 192-203 (1972).

The second map, dubbed the Ives map of 1861, is the one that accompanies Ives' final report. It depicts the natural contours in greater detail than the first map, and it contains a correction for latitude and longitude. Despite the relocation of the Lower Colorado further eastward, however, the second map still contains errors with respect to the river's proper location. Memorandum from Clark L. Gumm, Chief, Division of Cadastral Survey to Regional Solicitor, Los Angeles, California, July 22, 1971; See also U.S. Geological Survey, The Deposits of the Colorado River on the Fort Mojave Indian Reservation in California 1850-1969 (1970) n. 3, p. 10. Hence, the Hay and Wood Reserve plotted on either of these maps lies to the east of the Colorado River.

Pacific to Adjutant General, U.S. Army, Washington, D. C. March 12, 1870, National Archives, Record Group 49.

7/ The letter is from the Acting Secretary of War, L. A. Grant, to the President, dated September 18, 1890. This type of executive order vests the same type of equitable title in the Indians as a more formal definitive executive order. Department of the Interior, Federal Indian Law (1958) p. 620.

8/ Letter from Acting Director, Geological Survey to the Secretary of the Interior July 9, 1903, National Archives, Record Group No. 48.

9/ I attach relatively little weight to correspondence and documents that do not show any awareness of the potential for conflicting interpretations. For example, the first Reservation Superintendent, after the land was transferred to this Department, stated in a letter to the Commissioner of Indian Affairs dated December 8, 1891, that "the Hay and Wood Reservation is located . . . entirely on the East Bank of the Colorado River. . . . The Colorado River. . . is the western boundary of the Hay and Wood Reservation." However, the same letter states that the total acreage of the Hay and Wood Reservation is "9,114.81."

10/ William H. Goetzmann, Army Exploration in the American West, 1803-1863. (Yale 1959) pp. 380-393.

11/ Letter from Commissioner of Indian Affairs to the Secretary of the Interior, July 16, 1903, National Archives, Record Group No. 48. This BIA position may not have been consistently held throughout all the intervening 70 years. For example, the Commissioner of Indian Affairs concurred in a February 27, 1929, letter from the Acting Assistant Commissioner of the General Land Office to the Secretary of the Interior, which letter stated (based on a 1928 GLO survey to be discussed infra) that the western boundary as established by the courses and distances in the 1870 Wheeler Map was erroneous.

12/ See Memorandum from Area Director to Commissioner of Indian Affairs, March 14, 1973, supra Note 1 attachment Exhibit C.

13/ Id., Attachment Exhibit D. The Instructions, dated January 7, 1928, referred to "a small topographic map accompanying" them and stated:

> It will be observed that corners III and IV fall on ground so high as to preclude any possibility of the river having flowed to the west thereof in 1869. This condition can only be explained by assuming serious errors in the lengths

reservation for hay and wood. You will, therefore, run said boundaries on their record courses but only so far to the west as will place the west boundary in a position that conditions on the ground indicate as its probable position in 1869.

14/ State of California, 8 IBLA 164, 183 (1972).

14a/ A later map covering a much larger area and entitled "Western United States, 1:250,000, Needles," does show the western boundary as being in accordance with Blout's survey. This later map serves only to prove the inconsistency with which one branch of the Department has dealt with the issue. Geological Survey has two current maps which cover the Fort Mojave Indian Reservation, the 1950 Needles Quadrant and the above referenced map. Yet, the maps place the boundary in different places.

15/ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary, p. 1.

16/ Special Master's Report, pp. 282-83. The Special Master premised his conclusion on the conclusiveness of the GLO survey and its immunity to judicial review. However, any lack of judicial power to review the survey is irrelevant for the present purposes, because the Secretary of the Interior unquestionably has the power to set aside erroneous surveys by the GLO. Knight v. United States Land Association, 142 U.S. 161 (1891).

The Special Master also concluded that the 1928 survey correctively determined the boundary with respect to monuments as against courses and distances and area. Special Master's Report pp. 285-287. For the reasons discussed infra, I have concluded that the Special Master was in error.

17/ Memorandum of the United States Re Fort Mohave Indian Reservation Boundary. p. 10.

18/ 25 U.S.C. § 476.

18a/ Letter from Captain Pond, Camp Mojave to Headquarters, March 24, 1872, National Archives, Record Group 393, Ft. Mojave, Arizona, Letters sent.

19/ Rupkey Testimony, supra n.1, Tr. pp. 1391-1395.

20/ Survey Notes, supra, n.3.

21/ Not all of the notebooks used on the Wheeler expedition were available from the National Archives. It is believed that one of these, kept by either Wheeler or one of his colleagues, records the missing readings from Station No. 2.

22/ State of California, 8 IBLA 164, 181-182; See also U.S. Geological Survey, the Deposits of the Colorado River on the Fort Mojave Indian Reservation in California, 1850-1969 (1970) p. 8.

23/ Survey, Notes, supra., n. 3.

24/ See Memorandum from Area Director, supra, Note 1, Attachment p. 16.

25/ The facts of the terrain features are taken from Geological Survey maps for the Needles Quadrant, Calif. Arizona (1950) and the Needles Quadrant, Arizona; and from exhibits introduced by the BIA for the hearings in State of California, 8 IBLA 164 (1972).

26/ Rupkey Testimony, supra, no. 1.

27/ This resurvey was accomplished as part of the preparation of the case of the Ft. Mojave Tribe in State of California, IBLA 70-150, the decision of which is reported in 8 IBLA 164 (1972).

28/ All authorities on the subject support these propositions. Tiffany says: "In the case of a description by boundaries, as in other cases, the intention of the grantor, as inferred from the terms of the description, is the controlling consideration, and any rules which the courts may have formulated as to the relative importance of various elements of the description are merely intended as aids in arriving at this intention." 4 Tiffany, 3d ed., Sec. 993, pp. 94-95.

Thompson in his works on Real Property, emphasized the importance of the intention of the parties formulating the document containing the description, in these words: "* * * the general rules as to the greater or lesser degree of weight and control to be given to one form of description as compared with another are not absolute but are mere aids to be used in the construction of the deed to discover the real intent of the parties, such intent being the thing which governs where there is latant ambigutyi": 6 Thompson on Real Property, 1962 Replacement, Sec. 3021, p. 442.

29/ It is well established that for a call to a natural object to be controlling, it must be a locative call and not merely a descriptive or directory call. Locative calls are defined as specific calls, descriptions, or marks of location, referring to landmarks, physical objects, or other points by which the land can be exactly located and identified. Descriptive or directory calls are those which merely direct the neighborhood wherein the different specific calls may be found. 11 Corpus Juris Secundum, Boundaries, Sec. 4. The reference to a marked post in a mound near the river in 1870 manifestly did no more than describe generally the neighborhood of the boundary corner.

The indefiniteness of "near" is well illustrated by the case of Creech v. Johnson, 116 Ky. 441, 76 S.W. 185 (1903)

Cumberland Gap ' The Court there, In c struing the patent, "reversed" the calls so as to give effect to the intent to grant a specified number of acres, even the result was to locate the corner in question five miles from Cumberland Gap, the Court holding that such location might reasonably be spoken of in the survey, as "near Cumberland Gap." See also Mizell v. Simmons, 79 N.C. 182 (1878), to the effect that courses and distances must prevail over a call "to or near" the head of a certain creek.

More specifically, the California Court of Appeals has ruled that the expression "near the river" is not the equivalent of a description reading "at the river bank" and refused to hold that that language fixed the river bank as a controlling monument. San Pedro, L.A. & S.L. R. Co. v. Simmons Brick Co. 45 Cal. App. 57, 187 P. 62 (1919).

38/ Accord: Security Land & Exploration Co. v. Burns, 193 U.S. 167, 179-180 (1904).

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California, Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior, Defendants.	CASE NO. 81-0678-GT(M) FIRST AMENDED COMPLAINT FOR REVIEW OF ADMINISTRATIVE ACTION, FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Plaintiffs allege:

INTRODUCTION

1. Plaintiff, The Metropolitan Water District of Southern California (hereinafter referred to as "Metropolitan") seeks review of 3 orders of the defendant Secretary of the

Interior (hereinafter referred to as "Secretary") purporting to establish the boundaries of the reservations of the Fort Yuma (Quechan), Fort Mojave and Colorado River Indian tribes (hereinafter sometimes referred to as the "three tribes").

2. Metropolitan further seeks a declaration that certain lands of the bed of the Colorado River within the State of California, hereinafter described, which either the secretarial orders complained of purport to place within the boundaries of the reservations of the three tribes or are otherwise claimed by the United States to be within said reservations, are lands owned by the States of California and Arizona, respectively, in their sovereign capacity and are not a part of the reservations of the three tribes.

3. Plaintiff, the Coachella Valley Water District (hereinafter referred to as "Coachella") seeks a review of the order of the Secretary purporting to establish the boundary of the reservation of the Fort Yuma tribe only.

4. Coachella further seeks a declaration that certain lands of the bed of the Colorado River within the State of California, hereinafter described, which the order of the Secretary purporting to establish the boundary of the Fort Yuma Indian Reservation, purports to place within the boundaries of the Fort Yuma Indian Reservation, are lands owned by the State of California in its sovereign capacity and are not a part of the Fort Yuma Indian Reservation.

5. Plaintiffs challenge defendants' orders and seek declaratory and injunctive relief.

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JURISDICTION AND VENUE

6. This court has jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. §§701-706; 28 U.S.C. §1331 (Federal Question); and 28 U.S.C. §2201 (Declaratory Judgment).

7. Venue is proper in this court pursuant to 28 U.S.C. §1391(e)(3).

8. Plaintiffs have exhausted all administrative remedies and have no adequate remedy at law.

PARTIES

9. Metropolitan is a public agency established pursuant to the Metropolitan Water District Act (Cal. Stats. 1969, Ch. 209, as amended; Deering's Water Uncodified Acts 9129(b); West's Water Code Appendix 109-1) having its principal place of business at 1111 Sunset Boulevard, Los Angeles, California.

10. Metropolitan is engaged in the development, storage, and delivery of water at wholesale to its 27 member public agencies for municipal and domestic use. The member public agencies are all located in Southern California and consist of 14 cities, 12 municipal water districts and a county water authority. Metropolitan's service area extends into the counties of Los Angeles, Orange, Riverside, San Bernardino, San Diego, and Ventura and encompasses a population in excess of 12 million persons, approximately one-half the population of the State of California.

11. Coachella (formerly known as the Coachella Valley County Water District), is a public agency of the State of California, organized and existing pursuant to the provisions of

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the County Water District Law (Section 30000, et seq. of the Water Code) having its principal office at Coachella, California.

12. The territory of Coachella consists of approximately 650,000 acres principally being lands within Riverside County, California, but also including lands within Imperial County, California, and San Diego County, California. 5 cities are included within the territory of the District. The public activities of Coachella include the provision of irrigation and domestic water, agricultural drainage, water conservation, sanitation service and flood control. One of the principal activities of Coachella is to provide irrigation water to approximately 60,000 acres of agricultural lands.

13. Defendant, James Watt, is the Secretary of the Interior and is charged by statute with the supervision and management of the United States Department of the Interior.

14. The United States is the owner of and trustee for the reservations of the three tribes and therefore has an interest in this litigation. The Secretary of the Interior acts on behalf of the United States in administering these lands.

15. The United States, acting through the Secretary of the Interior, enters into Colorado River water delivery contracts under authority of the Boulder Canyon Project Act. (45 Stat. 1057 (1928) as amended; 43 U.S.C. §§617-617t.) The Act prohibits the use of stored water, except by such contracts. Section 5 of the Act, 43 U.S.C. §617(d), provides, in pertinent part, as follows:

> "The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river . . . as may be agreed upon,

> for irrigation and domestic uses . . . . No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."

16. A major portion of Metropolitan's water supply is obtained pursuant to a contract that Metropolitan has executed with the Secretary of the Interior, in accordance with the Boulder Canyon Project Act. That contract, dated April 24, 1930, provides, in part, for delivery of a permanent Colorado River water supply at Parker Dam for the use of Metropolitan.

17. Metropolitan's diversion and use of Colorado River water results in the principal municipal and domestic use of Colorado River water within the State of California.

18. All of the irrigation water supplied by Coachella is obtained pursuant to a contract that Coachella executed with the Secretary of the Interior on October 5, 1934, in accordance with the Boulder Canyon Project Act. That contract provides, in part, for delivery of Colorado River water at Imperial Dam for the use of Coachella.

19. Coachella's diversion and provision of Colorado River water for irrigation constitutes the principal irrigation water supply within the Coachella Valley Water District.

20. The Colorado River water delivery contracts entered into by the Secretary of the Interior are subject to and controlled by the Colorado River Compact entered into among the states of Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming, as approved by Section 13(a) of the Boulder Canyon Project Act. The Compact, among other matters, sets

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forth a division of the waters of the Colorado River between the Upper Basin (specified portions of the states of Arizona, Colorado, New Mexico, Utah and Wyoming) and the Lower Basin (specified portions of the states of Arizona, California, Nevada, New Mexico and Utah). Pursuant thereto, the Compact, in part, apportions to the Upper and to the Lower Basins, respectively, the beneficial consumptive use of 7.5 million acre-feet of water per annum.

21. On March 9, 1964, the United States Supreme Court decreed in Arizona v. California, 376 U.S. 340, 342, that if sufficient mainstream water is available, the states of Arizona, California and Nevada would be entitled to 7.5 million acre-feet of water per year. Of that 7.5 million acre-feet of water, California is apportioned 4.4 million acre-feet of water per year. The decree further provides that in the event the Secretary determines surplus water is available below Lee Ferry, California is entitled to one-half of said surplus.

22. Under the authority granted by Arizona v. California, supra, the Colorado River Basin Project Act (43 U.S.C. §1501, et seq. (1968)) and the 1970 Criteria for Coordinated Long-Range Operation of Colorado River Reservoirs (Vol. 35, No. 112 Federal Register (June 10, 1970)), promulgated pursuant to the Colorado River Basin Project Act of September 1968, the Secretary may release surplus and/or unused apportioned water. Pursuant thereto, the Secretary and agencies of the State of California have entered into contracts which allow those agencies to divert in excess of the 4.4 million acre-feet of water per year. When

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the Central Arizona Project commences operation in 1985, the operating criteria for the Colorado River reservoirs, provide that California may be restricted to its basic apportionment of 4.4 million acre-feet of water per year, plus one-half of any surplus waters available as determined by the Secretary.

23. The priorities of the California diverters are as set forth by the Secretary of the Interior in the 1931 General Criteria and in the contracts executed with each of said diverters. The first three priorities, in which Metropolitan has no interest, total 3.85 million acre-feet of water per year. The fourth priority, held by Metropolitan, is for 550,000 acre-feet of water per year, for use on the Coastal Plain of Southern California. The fifth priority, also held by Metropolitan, is for 662,000 acre-feet of water per year for use on the Coastal Plain of Southern California. Metropolitan has no interest in the remaining priorities. Thus, to the extent that water is available, Metropolitan is entitled to divert a total of 1,212,000 acre-feet of water per year. However, when California's entitlements are restricted to 4.4 million acre-feet of water per year, Metropolitan will be limited to a diversion of 550,000 acre-feet of water per year less any other diversions by persons or entities that have higher priorities than Metropolitan.

24. Coachella is one of the parties entitled to water under the third priority, the other principal party being the Imperial Irrigation District. The first three priorities, sometimes entitled "agricultural priorities", have a total entitlement of 3.85 million acre-feet of water annually. No

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specific number of acre-feet of water is allocated in each of such priorities, the limitation of each priority being based on area of use. Pursuant to an Agreement of Compromise under date of February 14, 1934, the Imperial Irrigation District has a prior right to the entitlement to water in the third priority over Coachella. Thus Coachella has the last right to water under the agricultural priorities and must suffer any diminution of the 3.85 million acre-feet annual entitlement. Currently, the agricultural water use by those agencies in the agricultural priorities exceeds 3.85 million acre-feet annually. This is possible because there is currently surplus water available. Such surplus water may not be available, however, when the entitlement of the California agencies is restricted to 4.4 million acre-feet annually.

25. The second priority is to the Yuma Project of the United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California. Presently, approximately 15,000 acres are being irrigated in the Yuma Project, including approximately 7,000 acres within the Fort Yuma Indian Reservation (Quechan Reservation). To the extent the Fort Yuma Reservation is enlarged by action of the Secretary of the Interior, there exists a possibility that additional water under the second priority will be put to use on such additional lands. This would reduce the water supply available to Coachella whose entitlement is in the last agricultural priority, that is, the third priority.

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26. Pursuant to Arizona v. California (1963) 373 U.S. 546, 600-601, 10 L.Ed.2d 542, each of the three tribes is entitled to divert Colorado River water on the basis of practicably irrigable acreage on their reservations with a priority date for said diversion for each parcel of each reservation the date each such parcel was established as part of the reservation. Each of the reservations of the three tribes was created prior to Metropolitan's date of priority.

27. Moreover, the 1964 decree in Arizona v. California (1964) 376 U.S. 340, 346, provided that the amount of water legally diverted pursuant thereto to the reservations of the three tribes is to be charged against the water appropriation of each state on the basis of the number of practicably irrigable reservation acres within each state.

28. The 1964 decree in Arizona v. California, supra, at 344-345, sets forth the interests of the three tribes. Those interests were subsequently specified in Article II(A) of the January 9, 1979 supplemental decree Arizona v. California (1979) 439 U.S. 419, 428, 58 L.Ed.2d 627, wherein the court provides as to the interests of the three tribes in California, as follows:

Defined Area of Land	Annual Diversions (acre-feet)	Net Acres	Priority Date
23) Yuma Indian Reservation	51,616	7,743	Jan. 9, 1884
24) Colorado River Indian Reservation	10,745	1,612	Nov. 22, 1873
	40,241	6,037	Nov. 16, 1874
	3,760	564	May 15, 1876
25) Fort Mojave Indian Reservation	13,698	2,119	Sept. 18, 1890

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To the extent those rights relate to acreage in California, those entitlements for diversion of Colorado River water are prior in right and time to those of Metropolitan.

29. Any purported changes in the boundaries of the three tribes which add practicably irrigable acreage to the respective reservations of the three tribes within California, and purport to be retroactive to the date such acreage was established as a part of the reservation, would add to the quantity of Colorado River water which each tribe would be entitled to divert from the Colorado River with a priority date which precedes the priorities of Metropolitan. Such diversions would diminish the quantity of water Metropolitan is entitled to divert each year from the Colorado River in any year in which California is restricted to 4.4 million acre-feet of water or less.

30. The issues as to the Fort Mojave and Colorado River Indian Reservation boundaries were raised in the original proceedings in Arizona v. California (1963) 373 U.S. 546, 10 L.Ed.2d 542, where the Special Master resolved them generally in favor of the California Parties. However, the Supreme Court concluded that there was no necessity to make such boundary determinations at that time, but left the issue open for future adjudication. Subsequently, the United States moved to reopen and modify the decree in Arizona v. California and requested, in part, a determination as to the number of practicably irrigable acres in each of the reservations based upon the boundaries as defined by the secretarial orders herein challenged. In these pending proceedings, the Special Master has declined to determine the

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boundaries of the reservations of the three tribes and instead has assumed that for purposes of water allocations, the boundaries as defined by the secretarial orders herein challenged were proper, and indicated that adjudication of the boundaries should be determined in a separate proceeding. (Arizona v. California, October Term 1979, No. 8, Original, Memorandum and Report on Preliminary Issues, Elbert P. Tuttle, Special Master, August 28, 1979, pp. 36-41.)

31. The secretarial orders complained of herein purport to increase the size of the respective reservations of the three tribes retroactively to the date of the creation of each reservation with the result of adding acreage within the State of California which may be regarded as practicably irrigable to each reservation. Therefore, they directly adversely affect the interests of Metropolitan.

32. The secretarial orders complained of herein purport to include land of the bed of the Colorado River within the reservations of the three tribes. In addition, irrespective of the secretarial orders complained of, the United States claims land of the bed of the Colorado River within the reservations of the three tribes. The United States holds land under navigable waters in trust for future states, to be granted to such states when they enter the Union and assume sovereignty on an equal footing with the other states. Consequently, these lands of the bed of the Colorado River belong to the States of California and Arizona, respectively. The secretarial orders complained of herein and the claims of the United States include such lands within the

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reservations of the three tribes with the result of adding lands in the State of California to each reservation claimed to be or which may be claimed to be practicably irrigable with a priority date prior to Metropolitan and Coachella, therefore directly, adversely affecting the interests of Metropolitan and Coachella.

FIRST CLAIM FOR RELIEF

(Fort Yuma Indian Reservation)

33. The Fort Yuma (Quechan) Indian Reservation was established by Executive Order dated January 9, 1884. A copy of the Executive Order is attached hereto, incorporated herein by this reference and marked as Exhibit 1.

34. Title to certain reservation lands was immediately and unconditionally ceded to the United States by virtue of a negotiated 1893 cession agreement with the Quechan Indian Tribe and an 1894 Act of Congress ratifying the agreement. (28 Stat. 286, 332.)

35. Three Department of Interior Solicitors' opinions over a 41-year period (Margold--1936, Weinberg--1968, Austin--1977) rejected the Indians' claims to reservation boundaries which included the land ceded by the 1893 agreement.

36. On December 20, 1978, Secretary of the Interior Cecil D. Andrus issued an order declaring the 1893 cession agreement and the 1894 ratifying statute of no effect, due to the alleged failure of the United States to fulfill the alleged conditions of the 1893 agreement. Copies of the Order and the Solicitor's Opinion upon which the order is based, are attached hereto, incorporated herein by this reference and marked,

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respectively, Exhibits 2 and 3. Therein, the Secretary purported to restore the boundaries of the Fort Yuma Indian Reservation to the boundaries as they were created by Exhibit 1 hereof.

37. The December 20, 1978 order of the Secretary is inconsistent with past secretarial orders and Department policy and action.

38. The December 20, 1978 order of the Secretary is not based upon substantial evidence and incorrectly interprets the 1893 agreement and 1894 ratifying statute. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

39. By issuing the December 20, 1978 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of plaintiffs.

40. An actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, concerning the location of the boundary of the Fort Yuma Indian Reservation. A fortiori, an actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, as to the Colorado River water entitlement of the additional land encompassed by the December 20, 1978 order. As a result of that order, the United States, the Secretary, and the Quechan Tribe through the United States, are claiming that those additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

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41. Plaintiffs desire a judicial determination and declaration as to the boundaries of the Fort Yuma Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

42. Plaintiffs further desire a mandatory injunction to require the Secretary to set aside the December 20, 1978 secretarial order at issue and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

43. The declaration and injunction are necessary and appropriate at this time so that plaintiffs can protect their rights to Colorado River water and can determine what portion, if any, of their existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable plaintiffs to make projections of the availability of water to meet the future needs of their service areas.

SECOND CLAIM FOR RELIEF

(Fort Yuma Indian Reservation)

44. Plaintiffs incorporated by this reference each and every allegation contained in paragraphs 1 through 36 inclusive hereof.

45. The December 20, 1978 secretarial order, Exhibit 2 hereof, purporting to restore the boundaries of the Fort Yuma Reservation purports to include certain lands of the bed of the Colorado River in its last natural course as a part of the Fort Yuma Indian Reservation.

46. Plaintiffs are informed and believe and thereon allege that the State of California is the owner of certain portions of the west half of the bed of the Colorado River in its last natural course. Therein, the lands more particularly described as:

Parcel Yuma A: Beginning at a point in the mid-channel of the abandoned bed of the June 1920 Colorado River on the Arizona-California state boundary in Section 30, Township 16 South, Range 23 East, S.B.M. (A-1); thence upstream along the mid-channel of said abandoned 1920 river channel to a point where it again intersects the California-Arizona boundary in Section 7, Township 8 South, Range 22 West, G. & S.R.M. (A-2); thence east along the state boundary to the mean high-water line of the California bank of the abandoned bed of the said 1920 river channel (A-3); thence downstream along the mean high-water line of said bank of the abandoned 1920 river channel to a point where it intersects the California-Arizona state boundary in Section 30, T. 16 S., R. 23 E., S.B.M. (A-4); thence easterly along said state boundary to its intersection with the mid-channel of said abandoned river bed, the point of beginning (A-1).

Parcel Yuma B: Beginning at a point where the present Arizona-California state boundary intersects the mid-channel of the abandoned bed of the 1920 channel of the Colorado River, immediately prior to the June 1920 avulsive change in the course of said river, in section 23, T. 16 S., R. 23 E., S.B.M. (B-1); thence upstream along said mid-channel of said abandoned river bed to a point where it intersects with the easterly extension of the north line of Section 15, T. 16 S., R. 23 E., S.B.M. (B-2); thence westerly along said extension of the north line of said Section 15 to the mean high-water line of the west bank of said abandoned 1920 channel of said river (B-3); thence downstream along said mean high-water line of the west bank of said abandoned 1920 channel of the Colorado River to its intersection with the present California-Arizona state boundary (B-4); thence easterly along said state boundary to its intersection with the mid-channel of said abandoned 1920 bed of said river, the point of beginning (B-1).

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Parcel Yuma C: Beginning at the point where the mean high-water line of the west bank of the Colorado River, as surveyed by the U. S. Geological Survey in 1902-03, intersects the easterly portion of the northerly boundary of the Fort Yuma Indian Reservation (C-1); thence southeasterly along the easterly portion of said northerly boundary to its intersection with the mid-channel of the 1902-03 course of the Colorado River (C-2); thence downstream along said mid-channel of the 1902-03 Colorado River to its intersection with the easterly extension of the north line of Section 15, T. 16 S., R. 23 E., S.B.M., (C-3); thence westerly along the north line of the easterly extension of said Section 15 to its intersection with the mean high-water line of the west bank of the 1902-03 course of the Colorado River (C-4); thence upstream along the mean high-water line of the west bank of the 1902-03 course of the Colorado River to the point of beginning (C-1).

Parcel Yuma D: Beginning at a point on the international boundary between the United States and Mexico where it intersects the mid-channel of the present course of the Colorado River (D-1); thence upstream along said mid-channel of said river to the point where the California-Arizona state boundary turns northerly, in Section 36, T. 16 S., R. 22 E., S.B.M., to leave the channel of said river (D-2); thence northerly along the course of said state boundary to the point where it intersects the mean high-water line of the California (north) bank of said river (D-3); thence downstream along the mean high-water line of the California bank of said river to the point where said mean high-water line intersects the international boundary between the United States and Mexico (D-4); thence easterly along said international boundary to the point of beginning (D-1)

and depicted on Exhibit 4, attached hereto and incorporated herein by this reference, which the secretarial order complained of purports to include within the Fort Yuma Indian Reservation in the State of California, are lands belonging to the State of California in its sovereign capacity and are not a part of the reservation.

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47. The December 20, 1978 order of the Secretary is inconsistent with past secretarial orders and Department policy and action.

48. The December 20, 1978 order of the Secretary is not based upon substantial evidence and incorrectly interprets the 1893 agreement and 1894 ratifying statute. It is arbitrary, capricious and unreasonable, and is illegal and void.

49. By issuing the December 20, 1978 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of plaintiffs.

50. An actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, concerning the inclusion of the lands referred to in paragraph 46 within the boundaries of the Fort Yuma Indian Reservation. A fortiori, an actual controversy has arisen and now exists between plaintiffs on the one hand, and the United States and the Secretary on the other hand, as to the Colorado River water entitlement of the additional lands so encompassed. As a result of that order, the United States, the Secretary and the Quechan Tribe through the United States, are claiming that those additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

51. Plaintiffs desire a judicial determination and declaration as to whether these lands, more particularly described in paragraph 46 herein, are or are not a part of the Fort Yuma Indian Reservation for the purpose of proper allocation of

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Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

52. Plaintiffs further desire a mandatory injunction to require the Secretary to set aside that portion of the December 20, 1978 secretarial order at issue, which purports to include certain lands of the bed of the Colorado River belonging to the State of California within the Fort Yuma Indian Reservation in the State of California, and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

53. The declaration and injunction are necessary and appropriate at this time so that plaintiffs can protect their rights to Colorado River water and can determine what portion, if any, of their existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable plaintiffs to make projections of the availability of water to meet the future needs of their service areas.

THIRD CLAIM FOR RELIEF

(Fort Mojave Indian Reservation)

54. Metropolitan incorporates by reference each and every allegation contained in paragraphs 1, 2, 5, 6 through 10, 13 through 17, 20 through 23, and 26 through 32, inclusive hereof.

55. An Executive Order dated March 30, 1870, established and defined the Fort Mojave Indian Reservation, consisting of the Camp Mojave Reserve and the Camp Mojave Hay and

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Wood Reserve. A copy of the Executive Order is attached hereto, incorporated herein by this reference and marked as Exhibit 5. The Executive Order provides as follows:

> "Camp Mojave. Commencing at a post marked U.S. in a mound of earth situated N. 83° 31' 37" E. 68.99 chains distant from the Flag staff at the Post. Thence variation 14° 08' 28" East. South 33° 08' 28" W. 240.00 chains to a post marked U.S. in a mound of sand. Thence N. 56° 51' 32" W. 232.60 chains to a post marked U.S. in a mound of coarse gravel. Thence N. 33° 08' 28" E. 240.00 chains to a post marked U.S. in a mound of coarse gravel near the West bank of Beaver Lake. Thence S. 56° 51' 32" E. 232.60 chains to the point of commencement. The said boundaries containing 5582 acres 1 rood 24 perches, a little more or less."
>
> "Camp Mojave Reservation for Hay and Wood-- Commencing at a post marked U.S. in mound of earth situated S. 10° 43' 41" E. 347.52 chains distant from the Flag Staff at Camp Mojave and about 20 chains S.W. from the point where the road crosses the top of the Mesa. Thence variation 14° 08' 28" East. S. 1° 04' 28" W. 272.50 chains to a post marked U.S. in mound of earth near the Quartermasters Corral. Thence S. 76° 17' 28" W. 228.50 chains to a post marked U.S. in mound of earth near the left bank of the Colorado River. Thence N. 23° 01' 32" W. 362.70 chains to a post marked U.S. in a mound of earth near the left bank of the Colorado River. Thence S. 88° 45' 32" E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9,114.81 acres, more or less." (Emphasis added.)

56. The 1870 order was based upon a survey conducted by Lt. George Wheeler. The description used in the Wheeler survey was adopted in the order.

57. The map prepared by Lt. Wheeler using his survey notes depicts the boundaries of the Camp Mojave Hay and Wood Reserve and shows the Colorado River running along the western boundary of the Camp Mojave Hay and Wood Reserve.

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58. By Executive Order dated September 19, 1890, the Camp Mojave Hay and Wood Reserve was transferred to the Department of the Interior to be held in trust for the Mojave Indian Tribe. A Copy of the Executive Order is attached hereto as Exhibit 6 and incorporated herein by this reference. The 1890 Executive Order did not alter the description of the Camp Mojave Hay and Wood Reserve.

59. As noted above, in the original Arizona v. California, supra, proceedings, the Special Master held as to the boundaries of the Camp Mojave Hay and Wood Reserve generally in favor of the California Parties.

60. On June 3, 1974, the Secretary issued an order finding the western boundary of the Camp Mojave Hay and Wood Reserve to be located west of the flood plain of the Colorado River. Copies of the Order and the Solicitor's opinion upon which the Order is based are attached hereto, incorporated herein by this reference and marked, respectively, as Exhibits 7 and 8.

61. The June 3, 1974 order of the Secretary is not based upon substantial evidence and is not supported by the description of the Camp Mojave Hay and Wood Reserve and the circumstances surrounding its creation. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

62. By issuing the June 3, 1974 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of Metropolitan.

63. Metropolitan is informed and believes and thereon alleges that the Secretary is delivering Colorado River water to

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lands located west of the left bank of the Colorado River in its last natural course.

64. An actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary concerning the location of the western boundary of the Camp Mojave Hay and Wood Reserve. A fortiori, an actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands encompassed by the June 3, 1974 order. As a result, the United States, the Secretary and the Fort Mojave Indians through the United States are claiming additional lands as a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

65. Metropolitan desires a judicial determination and declaration as to the boundaries of the Fort Mojave Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

66. Metropolitan further desires a mandatory injunction to require the Secretary to set aside the June 3, 1974 secretarial order at issue and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

67. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its rights to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced

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in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable Metropolitan to make projections of the availability of water to meet the future needs of its service area.

FOURTH CLAIM FOR RELIEF

(Fort Mojave Indian Reservation)

68. Metropolitan incorporates by reference each and every allegation contained in paragraphs 1, 2, 5, 6 through 10, 13 through 17, 20 through 23, 26 through 32, and 55 through 60, inclusive hereof.

69. The June 3, 1974 secretarial order, Exhibit 7 hereof, defining the boundaries of the Fort Mojave Indian Reservation purports to include certain lands of the bed of the Colorado River in its last natural course as a part of the Fort Mojave Indian Reservation.

70. Metropolitan is informed and believes and thereon alleges that the State of California is the owner of certain portions of the west half of the bed of the Colorado River in its last natural course. Exhibit 9, attached hereto and incorporated by this reference, depicts the alleged boundary of the Hay and Wood Reserve as claimed by the secretarial order and depicts the lands more particularly described as:

> Parcel Mojave D: Beginning at the point where the mid-channel of the abandoned bed of the 1947 course of the Colorado River intersects with the westerly extension of the northerly boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation (D-1); thence westerly along the extension of the northerly boundary of said Hay and Wood Reserve to its intersection with the mean high-water line of the west bank of the abandoned bed of the 1947 course of said river (D-2); thence downstream along the mean high-water line of the abandoned bed of the 1947

course of said river to its intersection with the mean high-water line of the west bank of the present course of the Colorado River (D-3); thence downstream along the mean high-water line of the west bank of the present course of the Colorado River to its intersection with the westerly extension of the southerly boundary of said Hay and Wood Reserve (D-4); thence easterly along said extension of the southerly boundary of said Hay and Wood Reserve to its intersection with the mid-channel of the present course of the Colorado River (D-5); thence upstream along the mid-channel of the present course of the Colorado River to its intersection with the mid-channel of the abandoned bed of the 1947 course of the Colorado River (D-6); thence upstream along the mid-channel of the abandoned bed of the 1947 course of said river to its intersection with the westerly extension of the northerly boundary of the Hay and Wood Reserve, the point of beginning (D-1).

Therein, this land which the secretarial order complained of purports to include within the Fort Mojave Indian Reservation in the State of California is land belonging to the State of California in its sovereign capacity and is not a part of the reservation.

71. Metropolitan is informed and believes and thereon alleges that the State of Arizona is the owner of certain portions of the east half of the bed of the Colorado River in its last natural course. Therein, the land more particularly described as:

Parcel Mojave C: Beginning at the point where the mid-channel of the abandoned bed of the 1947 course of the Colorado River intersected the westerly extension of the northerly line of the Hay and Wood Reserve of Fort Mojave Indian Reservation (C-1); thence downstream along the mid-channel of the 1947 course of said river to its intersection with the mid-channel of the present course of the Colorado River (C-2); thence upstream along the mid-channel of the present course of said river to its intersection with the westerly extension of the northerly line of said Hay and Wood Reserve (C-3); thence westerly along the extension of the northerly boundary of said Hay and Wood Reserve to the mid-channel of the abandoned bed of the 1947 course of the Colorado River, the point of beginning (C-1).

and as depicted on Exhibit 9 attached hereto and incorporated herein by this reference, which the secretarial order complained

of purports to include within the Fort Mojave Indian Reservation is land within the State of California, but belongs to the State of Arizona in its sovereign capacity and is not a part of the reservation.

72. The June 3, 1974 order of the Secretary is not based upon substantial evidence. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

73. By issuing the June 3, 1974 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of Metropolitan.

74. Metropolitan is informed and believes and thereon alleges that land claimed by the United States to be a part of the Fort Mojave Indian Reservation in the State of California, irrespective of the secretarial order is land belonging to the State of California and is not a part of the reservation. Said land is more particulary described as:

> Parcel Mojave B: Beginning at the point where the mean high-water line of the west bank of the abandoned bed of the 1947 course of the Colorado River intersected with the California-Nevada state boundary (B-1); thence downstream along the mean high-water line of the west bank of said river to its intersection with the westerly extension of the northerly boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation (B-2); thence easterly along the extension of the northerly boundary of said Hay and Wood Reserve to its intersection with the mid-channel of the abandoned bed of the 1947 course of said river (B-3); thence upstream along the mid-channel of the abandoned bed of the 1947 course of said river to its intersection with the California-Nevada state boundary as it existed in 1947 (B-4); thence northwesterly along said state boundary to the point of beginning (B-1)

and is depicted on Exhibit 9 hereof.

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75. Metropolitan is informed and believes and thereon alleges that land claimed by the United States to be a part of the Fort Mojave Indian Reservation irrespective of the secretarial order is land within the State of California, but belongs to the State of Arizona and is not a part of the reservation. Said land is more particularly described as:

> Parcel Mojave A: Beginning at the point where the mid-channel of the present course of the Colorado River intersected the southeasterly extension of the California-Nevada state boundary (A-1); thence downstream along said mid-channel of the present course of said river to its intersection with the westerly extension of the northerly boundary of the Hay and Wood Reserve of the Fort Mojave Indian Reservation (A-2); thence westerly along said extension of the northerly line of said Hay and Wood Reserve to its intersection with the mid-channel of the abandoned bed of the 1947 course of said river (A-3); thence upstream along the mid-channel of the abandoned bed of the 1947 course of said river to its intersection with the California-Nevada state boundary as it existed in 1947 (A-4); thence southeasterly along the extension of said state boundary to the point of beginning (A-1)

and is depicted on Exhibit 9 hereof.

76. An actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary concerning the inclusion of the lands referred to in paragraphs 70, 71, 74 and 75, within the boundaries of the Fort Mojave Indian Reservation in the State of California. A fortiori, an actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands so encompassed. As a result of the June 3, 1969 secretarial order and the claim of the United States, irrespective of the secretarial order to

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lands of the Colorado River bed in its last natural course, the United States, the Secretary and the Fort Mojave Indian Tribe through the United States, are claiming that these additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

77. Metropolitan desires a judicial determination and declaration as to whether these lands, more particularly described in paragraphs 70, 71, 74 and 75 hereof, are or are not a part of the Fort Mojave Indian Reservation in the State of California, for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

78. Metropolitan further desires a mandatory injunction to require the Secretary to set aside that portion of the June 3, 1974 secretarial order at issue, which purports to include certain lands of the bed of the Colorado River in its last natural course belonging to the States of California and Arizona, respectively, within the reservation in the State of California, and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

79. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its right to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such

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information is vital, at this time, to enable Metropolitan to make projections of the availability of water to meet the future needs of its service area.

FIFTH CLAIM FOR RELIEF

(Colorado River Indian Reservation)

80. Plaintiff Metropolitan incorporates by reference each and every allegation contained in paragraph 1, 2, 5, 6 through 10, 13 through 17, 20 through 23 and 26 through 32, inclusive hereof.

81. The Colorado River Indian Reservation was established by the Act of March 3, 1865. (13 Stat. 541, 559.)

82. The boundaries of the reservation were subsequently modified by various Executive Orders, including the Executive Order of May 15, 1876, a copy of which is attached hereto as Exhibit 10 and incorporated by this reference, which provided, in pertinent part:

> "Beginning at a point where La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning."
> (Emphasis added.)

83. The 1876 Executive Order established a portion of the boundary of the reservation which changes as the course of the Colorado River changes, except when such changes are due

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to avulsion (sudden and perceptible loss or addition to land by action of water, or sudden change in the bed or course of a stream).

84. As noted above, in the original Arizona v. California, supra, proceedings, the Special Master held as to the Colorado River Indian Reservation boundaries, generally in favor of the California Parties.

85. The Secretary, in an order dated January 17, 1969, declared that the 1876 Executive Order created a permanent, unchanging boundary along the west bank of the Colorado River as it existed in 1876. Copies of the Order and the Solicitor's Opinion upon which the order is based, are attached hereto, incorporated herein by this reference and marked, respectively, as Exhibits 11 and 12.

86. The January 17, 1969 order of the Secretary is not based upon substantial evidence and erroneously interprets the 1876 Executive Order. It is arbitrary, capricious and unreasonable, and therefore is illegal and void.

87. By issuing the January 17, 1969 order, the Secretary has acted and continues to act outside his statutory powers to the detriment of Metropolitan.

88. Metropolitan is informed and believes and thereon alleges that the Secretary is delivering Colorado River water to lands west of the western bank of the Colorado River in its last natural course in the area described as:

> " . . . thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; . . . ."

89. An actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary, concerning the boundary of the Colorado River Indian Reservation. A fortiori, an actual controversy has arisen and now exists among Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands encompassed by the January 17, 1969 order. As a result, the United States, the Secretary and the Colorado River Indian Tribe through the United States are claiming additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

90. Metropolitan desires a judicial determination and declaration as to the boundaries of the Colorado River Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

91. Metropolitan further desires a mandatory injunction to require the Secretary to set aside the January 17, 1969 secretarial order at issue and to prevent the unauthorized use of Colorado River water on any land declared to be outside the reservation boundaries.

92. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its right to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable Metropolitan to

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make projections of the availability of water to meet the future needs of its service area.

SIXTH CLAIM FOR RELIEF

93. Plaintiff Metropolitan incorporates by reference each and every allegation contained in paragraph 1, 2, 5, 6 through 10, 13 through 17, 20 through 23, 26 through 32 and 81 through 85, inclusive hereof.

94. Metropolitan is informed and believes and thereon alleges that the State of California is the owner of certain portions of the west half of the bed of the Colorado River in its last natural course and within the State of California. Therein, the lands more particularly described as:

> Parcel Colorado A: Beginning at the point where the westerly boundary of the Colorado River Indian Reservation from the top of Riverside Mountain in a direct line toward the place of beginning (as described in the May 15, 1876 Executive Order of President U.S. Grant) intersects the mean high-water line of the west bank of the Colorado River (A-1); thence downstream along the mean high-water line of the west bank of said river to a point where the mean high-water line of the west bank of the present course of the Colorado River intersects with the mean high-water line of the abandoned bed of the Colorado River as it existed immediately prior to the alleged avulsion caused by the Olive Lake Cut in February 1920 (A-2); thence southerly to the mid-channel of the present course of the Colorado River in Section 14, T. 4 N., R. 22 W., G. & S.R.M. (A-3); thence upstream along the mid-channel of the Colorado River to the point of intersection of said mid-channel with the extension of the aforesaid westerly boundary of said Reservation from the top of Riverside Mountain toward the place of beginning as described in the 1876 Executive Order (A-4); thence northerly along said extension of the westerly boundary of the Reservation from the top of Riverside Mountain to the point of beginning (A-1).

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Parcel Colorado B: Beginning at the point on the mean high-water line of the west bank of the present course of the Colorado River where it intersects with the mean high-water line of the abandoned bed of the Colorado River as it existed immediately prior to the alleged avulsion caused by the Olive Lake Cut in February 1920 (B-1); thence downstream along the mean high-water line of said abandoned bed of said river to a point in Section 12 T. 6 S., R. 23 E., S.B.M., where it intersects with the mean high-water line of the west bank of the present channel of the Colorado River (B-2); thence northerly along the mean high-water line of the west bank of the present channel of said river to its intersection with the mid-channel of the abandoned bed of the 1920 channel of said river (B-3); thence upstream along the mid-channel of the abandoned bed of the 1920 channel of said river to a point where it intersects the mean high-water line of the west bank of the present course of said river, opposite the point of beginning (B-4); thence easterly to the point of beginning (B-1).

Parcel Colorado D: Beginning at a point on the mean high-water line of the west bank of the abandoned bed of the Colorado River, as it existed immediately prior to the Ninth Avenue Cut in 1943, where it intersects the mean high-water line of the west bank of the present course of the Colorado River in Section 24, T. 6 S., R. 23 E., S.B.M. (D-1); thence downstream along the mean high-water line of the west bank of said abandoned 1943 channel of the Colorado River to a point where said mean high-water line intersects the westerly extension of the south boundary of the Colorado River Indian Reservation in Section 23, T. 6 S., R. 23 E., S.B.M. (D-2); thence easterly along said westerly extension of the south boundary of said Reservation to its intersection with the mid-channel of the abandoned bed of the 1943 course of the Colorado River (D-3); thence upstream along the mid-channel of said abandoned river bed to the point where it intersects the mean high-water line of the west bank of the present course of the Colorado River (D-4); thence northwesterly along the mean high-water line of the west bank of the present course of the Colorado River to its intersection with the mean high-water line of the west bank of the abandoned 1943 channel of said river, the point of beginning (D-1).

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Parcel Colorado F: Beginning at the point where the mid-channel of the abandoned bed of the 1920 channel of the Colorado River intersects with the mean high-water line of the west bank of the present course of said river, in Section 12, T. 6 S., R. 23 E., S.B.M. (F-1); thence downstream along the mean high-water line of the west bank of the present course of the Colorado River to its intersection with the mid-channel of the abandoned bed of the 1943 course of said river in Section 24, T. 6 S., R. 23 E., S.B.M. (F-2); thence northeasterly to the intersection of the mid-channel of the abandoned bed of the 1943 course of said river with the mid-channel of the present course of said river (F-3); thence upstream along the mid-channel of the present course of the Colorado River to its intersection with the mid-channel of the abandoned bed of the 1920 course of said river (F-4); thence westerly along the mid-channel of the abandoned bed of the 1920 course of said river to the point of beginning (F-1)

and as depicted on Exhibit 13, attached hereto and incorporated herein by this reference, which lands the United States claims to be a part of the Colorado River Indian Reservation irrespective of the secretarial order complained of are lands within the State of California and belong to the State of California in its sovereign capacity and are not a part of the reservation.

95. Metropolitan is informed and believes and thereon alleges that the State of Arizona is the owner of certain portions of the east half of the bed of the Colorado River in its last natural course and within the State of California. Therein, the lands more particularly described as:

Parcel Colorado C: Beginning at the point where the mid-channel of the abandoned bed of the Colorado River as it existed immediately prior to the alleged avulsion caused by the Olive Lake Cut in February 1920 intersects with the mean high-water line of the west bank of the present course of the Colorado River in Section 14, T. 4 N., 22 W., G. & S.R.M. (C-1); thence downstream along the mid-channel of said abandoned bed of the 1920 course of the Colorado River to the point where said mid-channel intersects with the mean high-water line of the west bank of the present course of the Colorado River (C-2); thence northerly along the mean high-water line of the west bank of

the present course of the Colorado River to its intersection with the mean high-water line of the east bank of the abandoned 1920 channel of said river (C-3); thence upstream along the mean high-water line of the east bank of the abandoned bed of the 1920 course of the Colorado River to a point where said mean high-water line intersects with the mean high-water line of the west bank of the present course of the Colorado River in Section 15, T. 4 N., R. 22 W., G. & S.R.M., opposite the point of beginning (C-4); thence easterly to the point of beginning (C-1).

Parcel Colorado E: Beginning at a point where the mean high-water line of the east bank of the abandoned bed of the Colorado River as it existed immediately prior to the Ninth Avenue Cut in 1943 intersects with the mean high-water line of the west bank of the present course of the Colorado River in Section 24, T. 6 S., R. 23 E., S.B.M. (E-1); thence northwesterly to the point where the mid-channel of said abandoned bed of the 1943 course of the Colorado River intersects with the mean high-water line of the west bank of the present course of the Colorado River (E-2); thence downstream along the mid-channel of the abandoned bed of said 1943 course of said river to a point where it intersects the westerly extension of the south boundary of the Colorado River Indian Reservation in Section 23, T. 6 S., R. 23 E., S.B.M. (E-3); thence easterly along the westerly extension of the south boundary of said Reservation to its intersection with the mean high-water line of the east bank of the abandoned bed of the 1943 course of the Colorado River (E-4); thence upstream along the mean high-water line of the east bank of the abandoned bed of the 1943 course of said river to the point of beginning (E-1)

and depicted on Exhibit 13, attached hereto and incorporated herein by this reference, which land the United States claims to be a part of the Colorado River Indian Reservation irrespective of the secretarial order complained of, are lands within the State of California, but belong to the State of Arizona in its sovereign capacity and are not a part of the Reservation.

96. An actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary

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concerning the inclusion of the lands referred to in paragraphs 94 and 95 within the boundaries of the Colorado River Indian Reservation. A fortiori, an actual controversy has arisen and now exists between Metropolitan, the United States and the Secretary as to the Colorado River water entitlement of the additional lands so encompassed. The United States, the Secretary and the Colorado River Indian Tribe through the United States, are claiming that these additional lands are a part of the reservation, some of which they allege are practicably irrigable and therefore entitled to additional water rights.

97. Metropolitan desires a judicial determination and declaration as to whether these lands, more particularly described in paragraphs 94 and 95 hereof are or are not a part of the Colorado River Indian Reservation for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act and Arizona v. California, supra, at 546.

98. The declaration and injunction are necessary and appropriate at this time so that Metropolitan can protect its right to Colorado River water and can determine what portion, if any, of its existing Colorado River entitlement may be reduced in the future by valid Indian reservation diversions. Such information is vital, at this time, to enable Metropolitan to make projections of the availability of water to meet the future needs of its service area.

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WHEREFORE, Metropolitan and Coachella pray for judgment against the defendants as follows:

(a) As to the First Claim for Relief, Metropolitan and Coachella pray:

(1) that the December 20, 1978 order of the Secretary be declared in error and void;

(2) for a determination and declaration that the boundary of the Fort Yuma Indian Reservation be determined in accordance with the 1893 agreement and the 1894 ratifying statute;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside the December 20, 1978 order and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the Fort Yuma Indian Reservation.

(b) As to the Second Claim for Relief, Metropolitan and Coachella pray:

(1) that the portion of the December 20, 1978 order of the Secretary which purports to include the lands of the bed of the Colorado River described in paragraph 46 hereof, as within the Fort Yuma Indian Reservation in the State of California, be declared in error and void;

(2) for a determination and declaration that the lands more particulary described in paragraph 46 hereof are not a part of the Fort Yuma Indian Reservation in the State of California;

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(3) for the issuance of a permanent injunction requiring the Secretary to set aside that portion of the December 20, 1978 order of the Secretary at issue which purports to include within the Fort Yuma Indian Reservation in the State of California, certain lands of the bed of the Colorado River belonging to the State of California as described in paragraph 46 hereof, and to prohibit the use of Colorado River water on lands found to be outside the boundaries of the Fort Yuma Indian Reservation.

(c) As to the Third Claim for Relief, Metropolitan prays:

(1) that the June 3, 1974 order of the Secretary fixing the western boundary of the Camp Mojave Hay and Wood Reserve west of the flood plain of the Colorado River be declared in error and void;

(2) for a determination and declaration that the western boundary of the Camp Mojave Hay and Wood Reserve is the left bank of the Colorado River in its last natural course, excluding the lands of the bed of the Colorado River;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside the June 3, 1974 order at issue and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the Camp Mojave Hay and Wood Reserve.

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(d) As to the Fourth Claim for Relief, Metropolitan prays:

(1) that the portion of the June 3, 1974 order of the Secretary which purports to include certain lands of the bed of the Colorado River as described in paragraphs 70, 71, 74 and 75 hereof, within the Fort Mojave Indian Reservation in the State of California, be declared in error and void;

(2) for a determination and declaration that the lands more particulary described in paragraphs 70, 71, 74 and 75 hereof are not a part of the Fort Mojave Indian Reservation in the State of California;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside that portion of the June 3, 1974 order of the Secretary at issue which purports to include within the Fort Mojave Indian Reservation in the State of California, lands of the bed of the Colorado River as described in paragraphs 70, 71, 74 and 75 hereof, and to prohibit the use of Colorado River water on lands found to be outside the boundaries of the Fort Mojave Indian Reservation.

(e) As to the Fifth Claim for Relief, Metropolitan prays:

(1) that the January 17, 1969 order of the Secretary interpreting the western boundary of the Colorado River Indian Reservation to be along the west bank of the Colorado River as it existed in 1876 be declared in error and void;

(2) for a determination and declaration that the western boundary of the Colorado River Indian Reservation described as:

> " . . . thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; . . . . "

be declared to be the west bank of the Colorado River in its last natural course;

(3) for the issuance of a permanent injunction requiring the Secretary to set aside the January 17, 1969 order at issue and prohibiting the use of Colorado River water on lands found to be outside the boundaries of the Colorado River Indian Reservation;

(f) As to the Sixth Claim for Relief, Metropolitan prays:

(1) for a determination and declaration that the lands more particulary described in paragraphs 94 and 95 hereof are not a part of the Colorado River Indian Reservation in the State of California;

(2) for the issuance of a permanent injunction to prohibit the use of Colorado River water on lands found to be outside the boundaries of the Colorado River Indian Reservation;

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(g) As to all aforesaid Claims for Relief, Metropolitan and Coachella pray for:

(1) costs of suit incurred herein; and

(2) for such other and additional relief as the Court deems appropriate.

The Metropolitan Water District of Southern California
Carl Boronkay, General Counsel
Warren J. Abbott, Assistant General Counsel
Karen L. Tachiki, Deputy General Counsel

Coachella Valley Water District
Maurice C. Sherrill
Redwine and Sherrill

By Carl Boronkay
Carl Boronkay

EXECUTIVE MANSION, *January 9, 1884.*

In lieu of an Executive order dated July 6, 1883, setting apart certain lands in the Territory of Arizona as a reservation for the Yuma Indians, which order is hereby canceled, it is hereby ordered that the following-described tract of country in the State of California, except so much thereof as is embraced within the Fort Yuma Military Reservation, viz, beginning at a point in the middle of the channel of the Colorado River due east of the meander corner to sections 19 and 30, township 15 south, range 24 east, San Bernardino meridian; thence west on the line between sections 19 and 30 to the range line between townships 23 and 24 east; thence continuing west on the section line to a point which, when surveyed, will be the corner to sections 22, 23, 26, and 27, in township 15 south, range 21 east; thence south on the line between sections 26 and 27, in township 15 south, range 21 east, and continuing south on the section lines to the intersection of the international boundary, being the corner to fractional sections 34 and 35, in township 16 south, range 21 east; thence easterly on the international boundary to the middle of the channel of the Colorado River; thence up said river, in the middle of the channel thereof, to the place of beginning, be, and the same is hereby, withdrawn from settlement and sale and set apart as a reservation for the Yuma and such other Indians as the Secretary of the Interior may see fit to settle thereon: *Provided, however*, That any tract or tracts included within the foregoing-described boundaries to which valid rights have attached under the laws of the United States are hereby excluded out of the reservation hereby made.

It is also hereby ordered that the Fort Yuma Military Reservation before mentioned be, and the same is hereby, transferred to the control of the Department of the Interior, to be used for Indian purposes in connection with the Indian reservation established by this order, said military reservation having been abandoned by the War Department for military purposes.

CHESTER A. ARTHUR.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

DEC 20 1978

SECRETARIAL ORDER

I. SOLICITOR'S OPINION

The Solicitor has signed an Opinion recognizing that the 1884 Executive Order boundary of the Fort Yuma Indian Reservation, as modified by the Executive Order of December 19, 1900, which revoked the portion of the reservation lying south of the Colorado River in the then Territory of Arizona, still remains the reservation boundary. Said Opinion is hereby approved. Attached hereto is a map entitled "Fort Yuma Indian Reservation 1884-1974, revised September 1974 S.D.T.," depicting the general location of the reservation boundary today. The exact location of the Reservation boundary shall be determined hereafter by survey in accordance with the boundaries recognized by this Order.

II. RECOGNITION OF TRUST STATUS OF LANDS

Except as hereinafter stated, all lands which prior to this date have been managed under the jurisdiction of the Bureau of Land Management or the Bureau of Reclamation and which the attached map indicates are within the Ft. Yuma Indian Reservation (hereafter referred to as "Such Lands") are hereby recognized as being held in trust by the United States for the Quechan Tribe of the Fort Yuma Indian Reservation as of January 9, 1884.

III. EXCEPTIONS AND CONDITIONS

The Solicitor's Opinion holds that an 1893 Agreement ratified by an 1894 statute providing for allotment of certain lands on the Fort Yuma Reservation and cession to the United States of other reservation lands was subject to conditions that were never carried out. Although the Solicitor's Opinion holds that the cession provided for in

the Agreement and statute did not take place, and that reservation lands which would have been ceded in that statute and which were not later taken pursuant to the 1904 statute remain in tribal ownership, the Solicitor's Opinion also holds that (1) pursuant to statutes predating 1884, certain valid rights were acquired by third parties that are protected by the Executive Order, (2) pursuant to later statutes, various Reclamation project works were validly constructed on the reservation, and (3) other valid grants were made by agencies of the United States to third parties. Accordingly, reaffirmation and recognition of the Tribe's title in Such Lands is subject to the exceptions and conditions set forth in this Paragraph III

1. There is hereby excepted from the provisions and effect of Paragraph II hereof all rights of third parties created by or pursuant to Acts of Congress including but not limited to the Act of July 26, 1866, 14 Stat. 289, and the Act of March 3, 1871, 16 Stat. 573, and predating the Executive Order establishing the reservation in 1884.

2. All rights of third parties to Such Lands within the now-recognized reservation boundaries which have been established pursuant to law prior to this date including but not limited to existing permits, patents, leases, rights-of-way and other rights and interests, including those generally described in subparagraphs a through oo following (and more particularly described in the cited instruments):

a. Bureau of Land Management Permit No. L.A. 0138603 for a petroleum products pipeline, issued to Southern Pacific Pipelines, Inc.

b. Bureau of Reclamation (LBR) contract nos. 14-06-303-1119, 1120 and 1122, executed July 3, 1956, consisting of licenses issued to Southern Pacific Pipelines, Inc., for a petroleum products pipeline right-of-way within and across LBR canal, lateral and drain rights-of-way.

c. LBR contract nos. 14-06-303-623, executed April 16, 1954, and 14-06-303-1435, executed August 18, 1958, consisting of easements granted to the County of Imperial for roadway and bridge rights-of-way across LBR canal and drain rights-of-way.

d. LBR contract no. 14-06-303-2683, executed December 22, 1967, consisting of a license issued to the County of Imperial for use and maintenance of road crossings on certain structures across the All-American Canal.

e. LBR contract no. 14-06-303-2788, executed February 26, 1970, granting to the State of California the right to construct, reconstruct, operate and maintain highway bridges and a highway across the right-of-way reserved for the All-American Canal.

f. LBR contract no. 14-06-300-149, consisting of an easement granted to the Imperial Irrigation District on February 19, 1954 (BLM Serial No. R 01908) for the Pilot Knob Power Plant.

g. LBR contract nos. 14-06-303-3451, executed November 1, 1973, and 14-06-303-3551, executed April 15, 1975, consisting of leases issued to Steve Bain and Ned Foss, respectively, for livestock grazing and feeding purposes.

h. LBR contract nos. 14-06-303-3452, 3455, 3463, 3464, 3465, 3466, 3467, 3468, 3469, 3470, 3471 and 3487, all executed January 1, 1973, consisting of leases for agricultural purposes to various individuals and corporations.

i. LBR contract nos. I24r-635, executed October 17, 1949, I24r-678, executed June 4, 1951, 14-06-300-1730, executed December 9, 1965, 14-06-303-3114, executed October 29, 1970, 14-06-303-3284, executed January 1, 1972, 14-06-303-3285, executed March 1, 1972, 14-06-303-3436, executed August 9, 1973 and 14-06-303-3588, executed September 1, 1975, consisting of permits issued to various individuals and governmental bodies for the removal of sand, gravel and road construction materials.

j. LBR contract nos. 14-06-303-1330, executed December 5, 1957, and 14-06-303-1412, executed May 9, 1958, consisting of licenses issued to the Pacific Telephone and Telegraph Company for telephone and telegraph line rights-of-way within and across BOR levee and canal rights-of-way.

k. LBR unnumbered contract issued April 5, 1961 for an indefinite period consisting of license issued Pacific Telephone and Telegraph Company for a pay phone booth.

l. LBR contract no. 141r-399, executed April 4, 1944, amended May 29, 1946, March 29, 1968, and March 31, 1969, consisting of a permit issued to Southern California Telephone Company (succeeded by Pacific Telephone and Telegraph Company) for the use of government telephone line poles.

m. LBR contract nos. 14-06-303-2465, executed February 27, 1967, 14-06-303-2421, executed July 26, 1967, 14-06-303-2790, executed March 10, 1969, 14-06-303-2922, executed July 1, 1969, and 14-06-303-3181, executed July 1, 1971, consisting of licenses issued to Mountain States Telephone and Telegraph Company for telephone and telegraph cable line rights-of-way within and across LBR levees, canal, lateral, ditch and drain rights-of-way.

n. LBR contract no. 14-06-303-3171, executed September 21, 1971, consisting of a license issued to the County of Imperial, California, for a refuse disposal dump.

o. LBR contract no. 14-06-300-2283 issued to the State of Arizona for fish and wildlife management at Mittery Lake.

p. LBR contract no. 14-06-303-3369, executed January 1, 1972, consisting of a lease to O.L. Reynolds for a mobile home park.

g. LBR contract no. 14-06-303-3438 issued to the Quechan Tribe May 7, 1974 pursuant to the Act of June 17, 1902 (32 Stat. 388) as amended by Act of August 4, 1939 (53 Stat. 1187).

r. BLM permit no. LA 055165 for a right of way for "Gila Drop #4" power transmission line and access road; approved July 23, 1942 pursuant to Act of December 5, 1924 (43 Stat. 672); amended May 19, 1971.

s. BLM permit no. LA 077775 for a right of way for the All-American Canal including appurtenant structures and operating telephone line, issued pursuant to §4(p) of the Act of December 5, 1924 (43 Stat. 704; 43 U.S. §417).

t. BLM permit no. R-03272 for a right of way for the Upper and Lower Reservation levees issued May 31, 1963 pursuant to §4(p) of the Act of December 5, 1924 (43 Stat. 704; 43 U.S.C. §417).

u. BLM permit no. R-1278 for a right of way for a drainage ditch issued December 19, 1968, pursuant to §4(p) of the Act of December 5, 1924 (43 Stat. 704; 43 U.S.C. §417).

v. Bureau of Land Management (BLM) Permit no. LA040525 for a right of way for a power transmission line granted to Southern Sierra Power Company March 23, 1927 pursuant to the Act of February 15, 1901 (31 Stat. 790.

w. BLM Permit no. LA022892 issued July 24, 1913 pursuant to the Act of March 4, 1911 (36 Stat. 1253) to Pacific Telephone and Telegraph for a telephone line.

x. BLM Permit no. 732756 "K" ELV 75022-07 and 12771-22 issued to the Catholic Church for a Mission site by Departmental authority of June 8, 1921.

y. BLM Ser. No. R0329, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of April 9, 1962, for Imperial Laguna Drain No. 2.

z. BLM Ser. No. LA 0164552, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of November 10, 1960, as amended December 5, 1960, for an electrical transmission line.

aa. BLM Ser No. LA 0164553, right-of-way grant to the Imperial Irrigation District, as specified in BLM decision of August 13, 1964, for an electrical transmission line.

bb. BLM Ser. No. R2331, right-of-way granted to the California Division of Highways, as specified in BLM decision of June 12, 1970, as amended April 25, 1973, and May 29, 1975, for Interstate Route 8.

cc. BLM Ser. No. R2704, right-of-way granted to the Supervisors of Imperial County and the State of California, approved on October 24, 1930, noted in General Land Office letter 1396492 "F" IEC of December 16, 1930, for a highway.

dd. BLM Ser. No. LA 0153352, right-of-way granted to Southern Pacific Pipe Lines, Inc., as specified in BLM decision of December 29, 1959, for a cathodic protection unit.

ee. BLM Ser. No. S3430, right-of-way granted to Southern Pacific Railroad Company by the Act of March 3, 1871, 16 Stat. 573, and confirmed by section 17 of the Act of August 15, 1894, 28 Stat. 335, for a railroad.

ff. BLM agricultural and residential use permits, BLM Ser. Nos. 1C-1(A), 1C-2(A), 1C-3(A), 1C-5(A), 1C-9(R), 2A-25(A), 2A-30(A),*/ 2C-3(A), 2C-4(A), 2C-5(A), 2C-6(A), 2C-9(A), 2C-14(A), 2C-15(A), 2C-25(a)*/ 2C-31(A),*/ 2C-32(A), 2C-35(A), 2C-37(A), 2C-38(R), 2C-41(R), 2C-42(R), 2C-43(R), 2C-44(R), 2C-45(R), 2C-46(R), 2C-48(R), 2C-51(R), 2C-58(R), 2C-CM-4(R), 2C-CM-5(R), 2C-LD-5(R), 3C-TH-1(R), 3C-TH-2(R), 3C-TH-4(R), 3C-TH-5(R), 3C-TH-6(R), 3C-TH-7(R), 3C-TH-8(R), 3C-TH-10(R), 3C-TH-11(R), 3C-TH-12(R), 3C-TH-13(R), 3C-TH-13a(R), 3C-TH-13b(R), 3C-TH-14(R),

*/ The determination by BLM to terminate these permits is being appealed by the permittees in Power v. Frizzell, No. 75-708 (D. Ariz.). Pending a decision on this appeal, the permittees' rights are preserved for the remainder of their terms.

3C-TH-17(R), 3C-TH-26(R), 3C-TH-29(R), 3C-TH-30(R), 3C-TH-30a(R), 3C-TH-32(R), 3C-TH-43(R), 3C-TH-45(R), 3C-TH-47(R), 3C-TH-50(R), 3C-TH-51(R), 3C-TH-52(R), 3C-TH-53(R), 3C-TH-54(R), 3C-TH-55(R), 3C-TH-56(R), 3C-TH-57(R), 3C-TH-58(R), 3C-TH-59(R), 3C-TH-61(R), 3C-TH-62(R), 3C-TH-63(R), 3C-TH-64(R), 3C-TH-65(R), 3D-TH-66(R), 3C-TH-67(R), 3C-TH-68(R), 3C-TH-69(R), 3C-TH-70a(R), 3C-TH-71(R), 3C-TH-71a(R), 3C-TH-71b(R), 3C-TH-72(R), 3C-TH-72a(R), 3C-TH-77(R), 3C-TH-78b(R), 3C-TH-79(r), 3C-TH-81(R), 3C-TH-82(R), 3C-TH-83(R), 3C-TH-84(R), 3C-TH-85(R), 3C-TH-86(R), 3C-TH-87(R), 3C-TH-88(R), 3C-TH-89(R), 3C-TH-92(R), 3C-TH-93(R), 3C-TH-94(R), 3C-TH-95(R), 3C-TH-96(R), 3C-TH-97(R), 3C-TH-98(R), 3C-TH-99(R).

gg. BLM Ser. No. R05651, right-of-way, as specified in BLM decision of August 25, 1964, for a transmission line.

hh. BLM Ser. No. S3450, right-of-way grant to the Southern Pacific Railroad approved June 18, 1907.

ii. BLM Ser. No. S3488, right-of-way grant to the Southern Pacific Railroad approved December 18, 1928, for station grounds.

jj. BLM Ser. No. S3484, right-of-way grant to the Inter California Railway approved February 10, 1910.

kk. BLM Ser. No. S3441, amended right-of-way grant to the California Highway Commission approved October 10, 1927, for a highway.

ll. Federal Power Commission Power Project 589 right of way issued to the Southern Sierra Power Company and successors for transmission line and appurtenant structures, issued May 10, 1926 pursuant to §24 of the Act of June 10, 1920 (41 Stat. 1063).

mm. Federal Power Commission Power Project 1397 right of way issued to Nevada Electric Co. July 1, 1938 pursuant to §24 of the Act of June 10, 1920 as amended by Act of August 26, 1935 (49 Stat. 838) for power transmission facilities.

nn. Federal Power Commission Power Site 614 right of way for power transmission facilities issued to Coachella Valley Electric Company May 2, 1917 pursuant to Act of June 25, 1910 (36 Stat. 847).

oo. A right of way granted to Southern Pacific Railroad Company pursuant to the Act of March 2, 1899, 30 Stat. 990 and confirmed in part by the Act of January 24, 1923, 42 Stat. 1172 and approved on July 29, 1926.

Excluding, however, those rights granted in the Riverside Park Lease with Yuma County (contract #14-010002-0007) to which lease the Tribe has withheld its consent and may instead terminate upon payment by the Tribe of fair compensation for all improvement, if any, which have been constructed on those lands since the effective date of the lease.

3. There is hereby excepted from the provisions and effect of Paragraph II hereof all rights and interests in lands in the so-called Bard area, opened to private settlement purusant to section 25 of the Act of April 21, 1904 (33 Stat. 189, 224).

As to all rights-of-way listed above which are not on lands listed in paragraph 4 of this Order and which were issued under the assumption that the lands involved were not Indian lands, I hereby grant a right-of-way pursuant to the authority vested in me by the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§323-28, each such grant being for the unexpired term of the original grant and subject to precisely the same terms and conditions as contained in the original grant. The Tribe has given its consent to these grants in Resolution R-19-77 dated September 29, 1977 and, purusant to 25 CFR §1.2, I hereby waive the requirements of 25 CFR part 161 pertaining to these rights-of-way, since I find that such waiver is in the best interest of the Quechan Indians.

As to all other permits, leases and other rights and interests listed above which are not on lands listed in paragraph 3 of this Order and which were issued under the assumption that the lands involved were not Indian lands, the Tribe has autorized and consented to issuance of such permits, leases and other rights and interests in Resolution R-19-77 dated September 29, 1977, and I hereby approve the same, pursuant to authority contained in the Act of May 11, 1938, c. 198, §1, 52 Stat. 347, 25 U.S.C. §396a, the Act of August 15, 1894, c. 290, §1, 28 Stat. 305, 25 U.S.C. §402, the Act of July 3, 1926, c. 787, 44 Stat. 894, 25 U.S.C. §402a, and the Act of August 9, 1955, c. 615, §1, 69 Stat. 539, 25 U.S.C. §415, each such permit, lease or other right or interest being for the unexpired term and subject to precisely the same terms and conditions specified in the original instrument. Pursuant to 25 CFR §1.2, I hereby waive the requirements of 25 CFR parts 131, 151 and 171 pertaining to these permits, leases and other rights and interests since I find that such waiver is in the best interest of the Quechan Indians.

4. There is hereby excepted from the provisions and effect of Paragraph II hereof fee title in the United States without being held in trust for the Quechan Tribe to the works and appurtenances including but not limited to the works described in the following subparagraphs a through r constructed pursuant to congressional authorization, including the Reclamation Act of June 17, 1902 (32 Stat. 388), acts amendatory and supplementary thereto, and the Boulder Canyon Project Act of December 21, 1928 (45 Stat. 1057), and fee title in the United States, without being held in trust for the Quechan Tribe, to lands occupied by all of said works and appurtenances, and there is also reserved the right of the United States, its licensees and contractors, to operate, maintain, and reconstruct said works and appurtenances, including but not limited to:

a. The All-American Canal, and all appurtenances (including but not limited to the Pilot Knob Check and Wasteway back to the Colorado River) as generally shown on Drawing No. 35-300-48, and Drawing No. 35-303-2127 attached hereto and incorporated herein by reference.

b. Laguna Dam Protection and Security Zone as shown on Drawing No. 423-300-704 attached hereto and incorporated herein by reference.

c. Laguna Settling Basin, Sediment Disposal Area and Security Zone, as shown and named as "Channel" and most of the "Wildlife Area" on the above Drawing No. 423-300-704.

d. Yuma Main Canal, California Wasteway, and Colorado River Siphon. The general location of the Yuma Main Canal and California Wasteway as shown and named on the above Drawing No. 35-300-48. The Siphon under the Colorado River is identified as "Siphon" on enclosed Drawing No. 212-303-1100 attached hereto and incorporated herein by reference.

e. Detention Reservoir Opposite Wash Overpasses on All-American Canal. At present there is only one area defined as a "Detention Reservoir," that being the Detention Reservoir as shown on Drawing No. 35-303-2127, basically existing below the All-American Canal. This reservoir is erroneously depicted as being part of the patented Bard area on the map referred to in Paragraph I hereof.

f. Upper and Lower Reservation Levees. The locations of the Upper and Lower Protective Levees are shown on Drawing No. 35-300-48; however, the Upper Levee is denoted only as "Reservation Levee." Both Levees are properly denoted on Drawing No. 35-303-2127.

g. Old Yuma Main Canal. The general location of this facility, a large portion of which is utilized as an interceptor drain, is shown on Drawing No. 212-303-1100.

h. Irrigation Canals and Laterals in Reservation Division Yuma Project. Drawings Nos. 35-303-2127 and 35-300-48 show these irrigation facilities.

i. All Drainage Channels as Presently Exist. Drawing Nos. 35-303-2127 and 35-300-48 indicate these facilities.

j. Siphon Drop and Pilot Knob Power Plants Together with Related Transmission Lines and Appurtenances. Both the Siphon Drop and Pilot Knob power plant locations are shown on Drawing No. 35-300-48, respectively named "Siphon Drop Power Plant" and "Pilot Knob Power Plant." In both cases, related facilities and appurtenances such as the Pilot Knob Drop, residences, other buildings, and related transmission lines and communication lines are not identified on any drawing.

k. Well Clusters. Several well clusters are placed along the Colorado River flood plain in conjunction with the U.S. Geological Survey, the purpose of which is a study to measure return flows. There is no reproducible drawing that would show as a composite the locations. The general locations are shown by "blue" lines on drawing No. 35-300-4

l. Parker-Davis 161-Kv Transmission Line. This line traverses the area from its crossing of the Colorado River westerly to the Knob Sub-station. The location is shown on Drawing No. 35-300-48.

m. Boundary Pumping Plant 34.5-Kv Transmission Line. This line interties the Valley Division's boundary pumping plant, the Yuma County Water Users' Association Headquarter Building, California Wasteway, Siphon Drop, and Imperial Dam, and is shown on Drawing No. 35-300-48.

n. Interconnecting Telephone, Electrical, and Remote Control Lines to Project Features. These features, which are appurtenances to other project facilities, are not contained on any drawings but are largely within rights-of-way of other project features.

o. Senator Wash Dam 69-Kv Transmission Line. Locati shown on Drawing No. 35-300-48.

p. Collector Line (South Gila Drainage). Location shown on Drawing No. 35-300-46 by "blue" pencil line extending from the Colorado River to South Gila Levee.

q. South Gila Levee (including Main Outlet Drain Extension). Location shown by drawing No. 35-300-48.

r. Gauging Station. Location shown by "blue" pencil mark below the letters "ol" in the word "Seminole" on Drawing No. 35-300-48, below the Winterhaven townsite.

Provided, however, that should any of the above works (excepting the works described in subparagraphs a., d., and j. hereto), be abandoned or cease to be used in connect with authorized Reclamation projects by the United States as determined in writing by the Secretary of the Interior equitable title therto shall revert to the Tribe, in all instances where the Tribe owns equitable title to lands immediately adjoining said works. A survey of the location and extent of the areas occupied by the works referred to above and the material sites referred to in paragraph 7 below will be made as promptly as possible by the United States without cost to the Tribe, and the results of that survey shall be reported to the Tribe, with any dispute thereon referred to the Secretary.

5. There is hereby reserved to the United States, its offi agents, employees, contractors, patentees, licensees, and holders of other rights, the right of ingress to, passage over and egress from Such Lands over existing or relocated roadways at all times for the purpose of exercising the rights specified in this Order and for all lawful purposes in connection with the maintenance and operation of all Reclamation works; provided however that new roadways will not be constructed on reservation lands without consent of the Tribe, and that existing roadways may be relocated by the Tribe at its own expense so long as they are adequat for the purposes served by the original roadway.

6. The Tribe's equitable title to Such Lands within the flood plain of the Colorado River, including Laguna Dam South Recreational Area, shall be subject to the rights of the United States under the Act of June 28, 1946, 60 Stat. 338. The Tribe shall not construct or install or permit the construction or installation of any permanent improvements on Such Lands within the flood plain or floodway as shown by "red" coloring on Drawing No. 423-300-1036 (Bureau of Reclamation, Flood Plain Information--Colorado River-Imperial Dam to San Luis, Plate 3 (August 1973)), attached hereto and incorporated herein by reference, nor will the Tribe permit said lands to be used in any manner inconsistent with or contrary to the purpose or intent of Executive Order No. 11296.

7. There is hereby reserved to the United States the right to continue in exclusive possession of all presently used material sites located within the now-recognized reservation boundaries, of sand, gravel, fill, clay and rock necessary for operation and maintenance of its project works, provided however that if the sites are abandoned or the use thereof is changed in any substantial manner by the United States, possession shall revert to the Tribe at its option. Provided further that the United States shall pay to the Tribe the fair market value of any and all materials removed from these sites from and after the date of this Order, and shall make regular periodic reports to the Tribe concerning the value of all materials removed.

IV. MISCELLANEOUS PROVISIONS

1. Nothing contained herein shall prevent the Tribe from recovering whatever compensation it may be determined is appropriate in any proceeding now pending or hereafter brought against the United States for past use of Such Lands.

2. Any claim for water rights in addition to that amount presently enjoyed under Arizona v. California, asserted in relation to Such Lands will be predicated only upon the criteria heretofore employed in Arizona v. California.

3. This Order determines the respective interests to Such Lands of the United States and the Quechan Tribe, subject to the provisions of Paragraph III of this Order. This Order does not affect any claim of the State of Arizona or the State of California or any successor of interest thereof may have to Such Lands.

4. All permits, patents, leases, rights of way and other rights and interests to Such Lands in existence on the date of this Order which are not enumerated or are not correctly enumerated in Paragraph III (2) of this Order shall, upon submission to the Office of the Secretary of the Interior and the Quechan Tribal Council, within 90 days of this Order be corrected or added to the enumeration in said Paragraph if determined to be valid by the Secretary after having given notice and an opportunity to be heard to the Quechan Tribe.

5. All agencies of the Department are hereby directed promptly to take all necessary steps to implement the Opinion of the Solicitor and the terms of this Order.

Secretary of the Interior

Attachments

EXHIBIT 2

54.

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

DEC 20 1978

Memorandum

To : Secretary

From : Solicitor

Re : Title to Certain Lands Within the Boundaries of the Ft. Yuma (now called Quechan) Indian Reservation

The Quechan Indian Tribe, the Bureau of Indian Affairs, 1/ and the Chairman of the Senate Committee on Interior and Insular Affairs, 2/ have requested this Department to reconsider the legal question of whether the Quechan Tribe retains ownership of approximately 25,000 acres of non-irrigable land within the boundaries of their 1884 Executive Order Reservation. This question has been considered on two previous occasions by the Solicitor, resulting in the issuance of opinions in 1936 (M-28198), and 1977 (M-36886), which have concluded that title to this land was unconditionally ceded to the United States by virtue of a negotiated 1893 cession agreement and an 1894 statute, ratifying such agreement. (28 Stat. 332).

Prior to the issuance of the 1977 Solicitor's opinion, a draft Solicitor's opinion to the opposite effect was widely circulated. That opinion concluded that the 1893 agreement and 1894 ratifying statute provided for a conditional cession of the non-irrigable lands, that the conditions were not fulfilled, and that the cession of the non-irrigable lands had therefore not been effected. Department files on this subject reveal that the draft opinion was seriously considered, and that extensive preparations were made for the issuance of a decision in favor of the tribe. The February 1976 decision by the Solicitor upholding the 1936 opinion was an unexpected event. The Senate Subcommittee on Indian Affairs held

1/ Memo of November 15, 1977, from Acting Assistant Secretary for Indian Affairs to Associate Solicitor for Indian Affairs.

2/ Letter of February 8, 1977, from Senator Henry Jackson to Honorable Cecil Andrus, Secretary of the Department of the Interior.

EXHIBIT 3

hearings in May and June of 1976, to air the controversy and learn the legal basis of the 1976 decision by the Solicitor. In those hearings, the Secretary agreed to direct the Solicitor to prepare a written legal opinion supporting the 1976 decision. A written opinion, M-36886, was published on January 17, 1977.

The sharp and continuing divergence in legal views with respect to this issue have persuaded me that the matter merits reconsideration. Accordingly, I directed review of the Department's files and all previously prepared legal opinions to provide an independent evaluation of the Quechan claim to the 25,000 non-irrigable acres.

Having reviewed that evaluation, I conclude that the 1893 agreement and 1894 ratifying statute provided for a conditional cession of the non-irrigable acreage. The conditions articulated in the agreement, which included the allotment and irrigation of irrigable land to the Indians, the sale of surplus to settlers under strictly prescribed conditions, the construction of an irrigation canal, and the opening of non-irrigable lands to settlement, were not met by the United States. No lump sum, or other form of compensation, was provided for the land cession. Allotment and irrigation did not occur on the reservation until Congress passed a 1904 statute (33 Stat. 189) which applied the Reclamation Act to the Ft. Yuma and Colorado River Reservations. The 1904 Act appears to be totally unrelated to the 1893 cession agreement, except for mention of it in the legislative history as part of the explanation of the continuing lack of irrigation on the reservation. In short, the conditional cession in 1893 was never effected and the title to the non-irrigable acreage, therefore, remains in the Tribe.

The records of this Department reveals that the non-irrigable lands were administered as tribal lands until the 1936 opinion of Solicitor Margold. See footnotes 8 and 9, infra, detailing the numerous occasions on which actions were taken by the Department during that period on the basis that these were Indian lands.

In the more than forty years since this Department first ruled that the land in question did not belong to the Quechan Tribe, third parties have acquired various interests such as easements or rights of way. Some of these interests existed prior to the establishment of the reservation, some were granted by Congress and still others were granted by Bureaus in this Department. My recognition of title in the Quechan Indians is subject to these valid third party interests. The Quechan Indian Tribe has previously recognized that their title will be subject to each of these third party interests and also to lands taken by the United States for reclamation purposes.

Background Facts

(3) The Fort Yuma Reservation was created by executive order on January 9, 1884. (1 Kappler, Indian Affairs—Laws and Treaties 832.) In 1893, the Quechan Indians sent a petition to the President and to Congress in which they indicated a willingness to cede their rights in their reservation in return for receiving allotments of irrigated land. (4) (S. Exec. Doc. No. 68, 53rd Cong., 2d Sess. 14-16 (1894)). The Indians expressed belief that they would improve economically if they had smaller, individual units of irrigated land, suitable for farming. In 1893, an agreement was negotiated providing for the allotment of irrigable lands, the sale of surplus irrigable lands under strictly prescribed conditions, the holding of sale proceeds in trust for the tribe and the opening of non-irrigable acres to settlement under the general land laws of the United States. There was no other provision for a lump sum payment or for any identifiable consideration. The agreement (5) was ratified by Congress in 1894 (28 Stat. 332). The ratifying act further provided that construction of an irrigation canal (the right-of-way for which had been granted in an 1893 statute) would have to be commenced within 3 years of the date of passage of the act or the right-of-way would be forfeited. In addition, each adult male was to receive free water for 1 acre of his allotment over a 10-year period.

During the following decade, allotment did not occur, the President did not proclaim the non-irrigable lands a part of the public domain and open to settlement, and the irrigation canal was not built. Then, in 1902, Congress passed the Reclamation Act. In 1904, mindful of the continuing and unsatisfied need for irrigation on both the Fort Yuma and Colorado River Reservations, Congress passed an Indian Appropriations Act which extended the benefits of the 1902 Reclamation Act to those two reservations, and which provided for the allotment of irrigable land to tribal members and for the sale of surplus irrigable lands to (6) non-Indians (33 Stat. 224). The terms under the 1904 Act for the sale of surplus lands and for holding of proceeds differed significantly from those in the 1893 agreement and 1894 ratifying act. The 1904 Act was (7) amended in 1911 to increase the allotments to 10 acres. (36 Stat. 1063.) Allotment of irrigable lands was completed by 1912. The irrigable lands were fully disposed of by 1949. The 25,000 non-irrigable acres were not returned to the public domain, opened to settlement and disposed of. They are the subject of this opinion. While the majority of these lands continue to be non-irrigable, it is estimated that between 5,000 and 5,500 acres, the bulk of which are in California, are "practicably" irrigable.

Legal Analysis - 1893 Agreement and 1894 Statute

The resolution of the title question turns, I believe, on the correct interpretation of the 1893 agreement and the ratifying statute. Case law establishes that when interpreting federal agreements and statutes pertaining to Indian affairs, one must consider the legislative history, as well as surrounding circumstances and subsequent administrative practices, to determine what the parties intended, and in particular, what the Indians understood the agreement to mean. In so doing, doubtful expressions are to be resolved in the Indians' favor. 3/ Clearly, such interpretative approach is appropriate in a case such as this where the trustee is examining and interpreting a transaction involving valuable assets of its ward, and in which the trustee is the other party to the transaction, who stands to gain from the disposition of the assets other than to the tribe. As stated in the case of Navajo Tribe v. United States, 364 F.2d 320, 322, 323 (Ct. Cl. 1966):

> Since the Department of the Interior had an obligation to safeguard the property of the Navajos when they were dealing with third parties, it is clear that an even greater duty existed when the Department itself entered into transactions with the Indians . . . . Because of this and because of the Government's special duty toward the Indians, the various dealings must be carefully scrutinized.

Neither the agreement nor the ratifying statute is sufficiently clear with regards to the cession of the non-irrigable lands to compel one interpretation over another. The actual language of the cession Article is:

> Article I. The said Yuma Indians, upon the conditions hereinafter expressed, do hereby surrender and relinquish to the United States all their right, title,

3/ Menominee Tribe v. United States, 391 U.S. 404 (1968); United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941); Antoine v. Washington, 420 U.S. 194 (1975), Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). The conclusions of this opinion flow from premises which differ from those in the 1936 and 1977 opinions in two fundamental respects: (a) a finding that the documents, rather than being clear, contain ambiguities in critical areas; and (b) canons of construction applied here are those which are uniquely applicable to controversies involving Indian rights as opposed to those which may apply to controversies generally.

> claim, and interest in and to and over the following described tract of country in San Diego, California, established by executive order of January 9, 1884, which describes its boundaries as follows. . .. (Emphasis added.)

The remaining articles of the agreement provide for the allotment of irrigable lands to Indians, the sale of surplus irrigable lands to settlers, the manner in which such sale was to be conducted and proceeds thereof handled, the issuing of trust patents and the opening of lands, not subject to irrigation, to settlement.

In Article I, there is an apparent conflict of meaning, with regard to timing of the cession, between the phrase, "upon the conditions hereinafter expressed" and the phrase, "do hereby surrender and relinquish." Also, the remainder of the agreement does not list conditions or governmental duties, describing them as such; this makes it difficult to discern from the face of the document, which of the Articles contain conditions or compensation which might affect the relinquishment. Article VI, the only article specifically relating to the non-irrigable lands, merely provides for the future opening of such lands to settlement—suggesting a session in trust, i.e., a session solely for purposes of permitting the United States to act as broker with respect to those lands. See Ash Sheep Co. v. United States, 253 U.S. 159 (1920). The corresponding provision in the ratifying statute provides that the non-irrigable lands shall become a part of the public domain, and shall be opened to settlement by Presidential proclamation. The language is in the future tense and requires executive action. Lastly, while the Article providing for the sale of irrigable lands provides for holding proceeds for the tribe, there is no corresponding arrangement expressed regarding the sale of non-irrigable lands. This raises the question of whether the same arrangement was intended, or understood, for the non-irrigable lands.

Under these circumstances the language is not clear and unambiguous on its face. It is not clear to me, from the cited language, that the Indians immediately ceded title to all their reservation lands, for no money whatsoever, and without actual performance of certain acts by the United States government.

Because the language of the agreement and statute is not clear, it is necessary to resort to rules of interpretation. I am aware of the general principles of contract law which favor the construction of provisions of contracts as promises rather than conditions, 3A A. Corbin, Contracts, §635 (rev. ed. 1960); 5 S. Williston, A Treatise on the Law of Contracts, §665 (W.H.E. Jaeger ed. 1961), and the general principles of real estate law which favor covenants over conditions. See 2 R. Powell, The Law of Real Property, §§187, 188 (1974); cf. I American Law of

Property, §2.8 (1952); 5 id. § 21.3(a). Technical rules of conveyance should not be applied in the construction of agreements between the Indians and the government. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970). Rather, as noted above, the focal point of such construction is the intent of the parties. Thus, when construing another cession agreement containing conditional language, the Supreme Court examined legislative history, contemporary statements by tribal members, actual benefits delivered to the tribe (i.e., lump sum payment) and subsequent treatment of the lands. DeCoteau v. District Court, 420 U.S. 425 (1975). In finding that an immediate cession was effected, in spite of seemingly conditional language, the Supreme Court relied heavily on the facts that a sum certain was paid for the lands and that there was no evidence that the lands were subsequently administered as Indian lands. (DeCoteau, supra at 448). Furthermore, the Court examined numerous contemporaneous accounts of the cession, which showed that at least some Indians believed they had sold their land.

The background information in this case is quite different from that in DeCoteau. The legislative history indicates that the main purpose of the Agreement — from the standpoint of the Indians who signed it, 4/

4/ In a post-Agreement letter from the Indians to the President and Congress, the Tribe explained why they were willing to cede their lands:

> We believe if furnished with a small tract of land, with water to irrigate it and with the means of cultivating, we could improve our fortunes to the extent of securing at least all the necessaries of life. We believe if the land now embraced in our reservation could be thrown open to settlement an irrigating ditch would be built through the reservation. . . . While with water the soil is fertile, nothing will grow without irrigation, for there is no rain. Hence we want the ditch built so that we can get water and have early and large crops like our white friends. We are willing to give up a large part of our reservation because as it is it is worthless to us, if we can have small tracts set apart for our use.
> (Emphasis added).

53rd Congress, 2d Session, Senate Ex. Doc. 68 at 14-15.

EXHIBIT 3

and the Congress that ratified it 5/ — was to provide irrigation to the reservation. Indeed, in the 1894 statute, Congress added statutory provisions concerning the construction of a canal requiring that it be commenced within 3 years or the right of way previously granted would be forfeited. The Indians perceived farming irrigated allotments as the key to acheiving their goal of economic improvement and they offered to cede their reservation in return for irrigated allotments, perhaps believing they had to do so to entice government action (since the negotiation of cession-allotment agreements was a prevailing practice at that time). There is no evidence that obtaining money as the desired compensation was considered by the Indians.

Evidence of either the government's or the tribe's intent regarding the non-irrigable lands is inconclusive. There is nothing to suggest that the government wanted to acquire the non-irrigable lands. In the negotiated agreement, the government did not specify any compensation for the non-irrigable lands, whereas it did clearly provide compensation for any irrigable lands that would be removed from Indian ownership. This is a particularly troublesome point because the cession agreement was negotiated pursuant to the General Allotment Act which authorized the government to negotiate for the cession of surplus Indian lands, upon just and equitable terms. (24 Stat. 389, §5, 25 U.S.C. §348). This failure of compensation for the non-irrigable lands seems a crucial "oversight" of the agreement.

To be sure, Congress could have simply taken the non-irrigable lands under Article VI of the Agreement with no compensation. 6/ However, evidence of such intent is not obvious. First, the Government had

5/ The paramount reason for the proposed Agreement is found in the proposition of the Colorado River Irrigating Company to furnish the Yuma Indians with water for irrigation purposes. 53rd Congress, 2d Session, House Report No. 1145, at 2. See also Senate Ex. Doc. 68, supra. Later legislative history affirms this view of the 1894 Act. 58th Congress, 2d Session, Senate Report 1660.

6/ The courts have held that Congress (or the executive, for that matter) could constitutionally take the land of an executive order reservation even without providing the tribe any compensation. Sioux Tribe v. United States, 316 U.S. 317 (1942); Hynes v. Grimes Packing Co., 337 U.S. 86, 103-104 (1949). The result of these cases, however, was not clearly anticipated in 1904. Cf. 34 Op. A.G. 181 (1924); 13 L.D. 628 (1891); 12 L.D. 205 (1890).

proceeded by agreement with the Indians. Secondly, the Agreement and statute were intended to implement the General Allotment Act, which authorized the Secretary to negotiate with Indians for the cession of their lands only under such terms as were "just and equitable." Congress and the Department, it seems, were acting more in their guardianship capacity, 7/ and not in a confiscatory manner.

There is, moreover, nothing in the history of that time indicating that the government had any particular interest in acquiring the lands in question. By contrast, in the case of the cession agreement construed in the DeCoteau case, there was evidence of strong pressure by non-Indian settlers on the government to acquire particular Indian lands so that the settlers could move in. Not only is evidence of such pressure totally lacking in this case, but the government's failure to ever open the land to settlement strengthens the impression that no one was very interested in, much less had specific designs on, the land.

There is a similar lack of evidence as to how the Indians understood the agreement to affect the status of the non-irrigable lands. It must be remembered that Article VI of the agreement did not refer to the cession or sale of non-irrigable lands, nor did it state they were returned to the public domain. It merely stated they would be opened to settlement. One might assume that because the Indians expressed interest in farming irrigated land, that the Indians were as disinterested in the non-irrigable land as was the government. But, whether the Indians understood that they had casually given away such land, without any apparent compensation, and without retaining any interest therein, is a further assumption for which there is simply no evidence and, therefore, which we are not justified in making. Belief that non-Indian settlement on such lands to be a benefit to the Indians and, therefore, a condition of, or compensation for the cession of such lands, in strict technical sense, a possible theory supporting an immediate session. However, it is not clear that these Indians—who were not versed in either the English language or such a sophisticated concept—understood that they would be giving up valuable real estate in exchange for the "privilege" of having non-Indian settlers as neighbors on their reservations.

In addition to the lack of payment, and the lack of evidence that the parties intended the transfer of the non-irrigable lands, this case differs sharply from that in DeCoteau and in Rosebud, in that the

7/ Shoshone Tribe v. United States, 299 U.S. 476 (1937); United States v. Creek Nation, 295 U.S. 103, 109-110 (1935); Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919); United States v. Lynah, 188 U.S. 445, 462 (1903).

Department of Indian Affairs continued to administer the non-irrigable lands in trust for the tribe in the granting of leases and permits and in holding rents in trust for the tribe.

The results of an intensive file review, conducted in 1975 by staff of the Solicitor's Office and detailed below, show a clear and basically consistent history of administration of the non-irrigable lands by the Bureau of Indian Affairs prior to the 1936 Solicitor's Opinion. This administrative history was acknowledged in the 1936 Opinion. Maps of the area issued between 1894 and 1936 include the Fort Yuma Indian Reservation and depict its boundaries as declared in the 1884 Executive Order. 8/ The Bureau of Land Management's plat records, as well as the

8/ E.g., U.S.G.S. map, "Colorado River from Black Canyon, Ariz.-Nev. to Arizona-Sonora Boundary," surveyed in 1902 and 1903 (Exhibit RO-13, Quechan Tribe v. United States, Indian Claims Commission Docket No. 320 [hereinafter cited as Claims Exhibit ____]); U.S.G.S. map "Yuma Quadrangle, California-Arizona," edition of April 1905 (BIA Files, Phoenix); 1936 reprint of April 1905 U.S.G.S. map (Claims Exhibit RO-13); U.S. Reclamation Service maps of the Yuma Project in its annual reports to Congress (e.g., Third Annual Report: 1903-04, at 192-193 (2d ed. 1905); Fifth annual Report: 1906, at 100-01 (1907)); U.S. Reclamation Service Map No. 16774 (January 1916) (Yuma Project File 154-D, A610158; File 154, "Lands-General," A609223); U.S. Reclamation Service Map No. 17471 (1917) (Yuma Project File 154, "Lands-General," A609224, 2-328). The latter two maps, which were produced after issuance of the Indian trust allotment patents on February 5, 1914, show the Indian Allotments (or Indian Unit) and continue to depict the entire area encompassed by the 1884 Executive Order as the Yuma Indian Reservation. The field notes, reports and official plat of survey prepared by General Land Office Surveyor John L. Warboys between 1931 and 1934, as well as the underlying assignment instructions (Special Instructions Group 264, California) repeatedly refer to, affirm and adopt the "West Boundary of the Yuma Indian Reservation" as described in the 1884 Executive Order and fixed by the Ingalls survey in 1895; and General Land Office Special Instructions Group 281, relating to T. 16 S., R. 23 E., S.B.M., dated April 15, 1932, refers to "that portion of the Yuma Indian Reservation lying between the Reclamation Levee and the abandoned channel of the Colorado River" (Claims Exhibit RO-13 and supporting documents). Additional maps recognizing the continued existence of the reservation as described in the 1884 Executive Order are listed in note 9 infra.

original documents signed at the Secretarial level, show that all rights of way issued by the Department across the non-irrigable lands (except those which may have been issued by the Bureau of Reclamation within its own rights of way) were issued under statutory authority pertaining to Indian reservations. 9/ The Commissioner of Indian Affairs issued

9/ "Map of the Definite Location of the Southern Pacific Railroad in the Yuma Indian Reservation, California," G.L.O. no. 506131-1915, surveyed December 1906, submitted to the Indian Agent, Yuma Indian Reservation, March 13, 1907, and approved by Acting Secretary of the Interior George W. Woodruff on June 18, 1907, subject to the provisions of the Act of March 2, 1899 (30 Stat. 990, as amended, 25 U.S.C. §§ 312-18) (BIA Files, Phoenix) (the BLM plat records for section 36, T. 16 S., R. 22 E., Record issuance of another right-of-way to the railroad under the 1899 Act, with jurisdiction in the BIA on July 29, 1926 (R. 1359, S 3492)); "Map of the Definite Location of the Inter California Railway in Yuma Indian Reservation, California," received by Superintendent Egan, Yuma Indian Reservation, September 30, 1909, and approved by the Department February 10, 1910, under the Act of March 2, 1899, with the schedule of compensation to the Indians required by that act being approved by First Assistant Secretary Frank Pierce on May 14, 1910, pursuant to the recommendation of Superintendent Egan and Commissioner of Indian Affairs Valentine (BIA Files, Phoenix); "Proposed Telephone and Telegraph Line Crossing the Yuma Indian Reservation," Pacific Telephone and Telegraph Company, Right of Way Map LA 011977, approved by First Assistant Secretary of the Interior A.A. Jones on July 3, 1913, pursuant to the Act of March 4, 1911 (36 Stat. 1253, as amended, 43 U.S.C. § 961), with the requisite finding for Indian reservation lands of compatibility with the public interest being made by the First Assistant Secretary by notation on the July 2, 1913, memorandum from the Second Assistant Commissioner of Indian Affairs to the Secretary recommending approval, and with rental, payable to the account of the Quechan Tribe, being set at $8.66 for the first year (Claims Exhibit RO-3) (related documents show the rental fee was collected on behalf of the Tribe for the full 50 year term of the right of way); "Center Line Location Map of Proposed Highline Canal from Laguna Dam to Imperial Valley and Location of Power Plant," dated June, 1915, showing the reservation boundaries as established in 1884, submitted for the approval of the Secretary of the Interior pursuant to sections

(Footnote 9 continued)

18-21 of the Act of March 3, 1891 (26 Stat. 1095, 1101-02, as amended, 43 U.S.C. §§ 946-49), section 2 of the Act of May 11. 1898 (30 Stat. 404, as amended, 43 U.S.C. § 951), and the Act of February 15, 1901 (31 Stat. 790, as amended, 43 U.S.C. §959), all of which authorize rights of way through Indian reservations as well as public lands (BIA Files, Phoenix—no indication as to whether the right of way was approved); Memorandum dated June 6, 1917, from Assistant Commissioner of Indian Affairs Meritt to Commissioner Tallman of the General Land Office, responding to the latter's request for a report on the application of the Coachella Valley Ice and Electric Company for a right of way for an electrical transmission line across Yuma Indian lands (all in the non-irrigable western portion of the 1884 reservation), advising that "the proposed right of way involves no Indian allotments but crosses a portion of the Yuma Indian Reservation which is absolutely waste desert land and upon which no Indians reside," and recommending approval of the application with an annual charge of $5 per mile as compensation for damage to the Yuma Indian Reservation lands involved (BIA Files, Phoenix); "Proposed State Highway Through Yuma Indian Reservation," California Highway Commission, dated July 16, 1923, as amended by maps of changes "A" through "D", dated September 28, 1923, through May 1924, approved by Assistant Secretary of the Interior John H. Edwards on October 10, 1927, subject to the provisions of the Act of March 3, 1901 (31 Stat. 1058, 1084, 25 U.S.C. § 311), and amending the right of way as originally approved under the same act on November 9, 1917 (Claims Exhibit RO-8; BLM Plat Records, Sacramento): Order of withdrawal and reservation of a right of way for a proposed Reclamation Servic "power canal from siphon drop to Araz" across the Yuma Indian Reservation, withdrawing and reserving 236.05 acres of reservation land, of which approximately 3.5 acres were allotted lands, recommended by Director and Chief Engineer Davis of the U.S. Reclamation Service on April 15, 1918, concurred in by Assistant Commissioner of Indian Affairs Meritt on the "understanding that adequate compensation be assessed and paid for damage to Indian lands involved," concurred in by Commissioner Tallman of the Gener Land Office, and approved on June 17, 1918, by Assistant Secretary of the Interior S.G. Hopkins under sections 13 and 14 of the Act of June 25, 1910 (36 Stat. 855. 858, 43 U.S.C. § 148, 25 U.S.C. § 352) (Yuma Project File 150, Purchase of Lands-General, 1909

trader's licenses to occupy and use non-irrigable land on the reservation, near the western boundary until the issuance of the 1936 Solicitor's Opinion. 10/ Sand and gravel leases were issued by the Bureau of Indian Affairs on tribal unallotted lands within the Yuma Indian Reservation from at least 1929 to 1936 pursuant to section 26 of the Act of June 30, 1919 (41 Stat. 31, as amended, 25 U.S.C. § 399). The tracts which were described were all non-irrigable lands in the western portion of the reservation. 11/

(Footnote 9 continued)

thru June 1919," A606156, A606163, A606167-68); "Southern Pacific Railroad Station Grounds" map received by the Superintendent of the Yuma Indian Reservation June 30, 1928, and approved by the Department on December 18, 1928, pursuant to the Act of March 2, 1899, supra (Claims Exhibit RO-11; BLM Plat Records, Sacramento). The Bureau of Land Management plat records in Sacramento, California show three additional rights of way issued under statutes governing Indian reservation lands and noted as being under the jurisdiction of the Bureau of Indian Affairs; a highway right of way, R 2704, issued October 24, 1930, under the Act of March 3, 1901, supra, a telephone and telegraph line right of way, S 3489, issued June 14, 1927, under the Act of March 3, 1901, supra, and a transmission and telephone right of way, LA 040525, issued March 23, 1927, under the Act of February 15, 1901, supra.

10/ Trader's License covering 80 acres in the N/2 of the NW/2, section 25, T. 16 S., R. 21 E., S.B.M., issued to Robert M. Goebel January 1, 1928, to James H. Maxey August 6, 1929, and thereafter to Maxey and later his widow, Mary A. Maxey, through various renewals (BIA Files, Phoenix).

11/ Letter dated June 18, 1935, from the Commissioner of Indian Affairs to Superintendent Jolley, Fort Yuma Agency; Letters dated December 13, 1939, and April 6, 1943, from Superintendent Gensler, Colorado River Indian Agency, to the United States Fidelity and Guarantee Company; Letter dated March 29, 1943, from BIA Field Agent Cox, Fort Yuma Sub-Agency, to Superintendent Gensler; Letter dated November 18, 1934, from H.L. Gardner to the Quechan Tribal Council; Letter dated August 3, 1934, from H.L. Gardner to Superintendent Jolley,

(Footnote 11 continued)

Fort Yuma Indian Agency; Notices of location of placer mining claims by Rosa Lee Black and Patsy Black on February 26, 1935, filed with the Fort Yuma Indian Agency on March 18 and April 2, 1935, within 60 days of location as required by the 1919 Act (BIA Files, Phoenix, Claims Exhibits RO-4, RO-12, RO-15).

There is no record of management of the non-irrigable areas by the Bureau of Land Management prior to 1936. Only one document even hints at such management by the Bureau of Reclamation. On October 28, 1953, an "Analysis of G.L. Account 271.22—Rental of Farming and Grazing Lands" was prepared to ascertain the portion of "Miscellaneous Non-operating Income—Other" attributable to the rental of grazing and farming lands covered into such account between 1910 and 1953. The entries are jumbled and clearly inaccurate in places. The covering memorandum states that "some of the income . . . was from Mining and Gravel Leases, and still a larger portion from lands lying outside both irrigation divisions. Probably all of the Mining and Gravel leases, as well as a sizeable portion of the Grazing and Farming leases, lie outside the two irrigation divisions." An inspection of the entries confirms that all of the leases listed in the "Gravel and Mining" column were on non-irrigable reservation lands, except perhaps Lease I24r-358 issued to Emil Frank. But all of them are entered in the ledgers after 1940, and most, if not all of them, are almost surely the same sand and gravel leases that were administered by the Bureau of Indian Affairs prior to 1936. See, e.g., leases I24r-417 and I24r-504 issued to H.L. Gardner and the leases issued to C.H. Trigg and Emil Frank and compare them with the BIA leases issued to the same persons as described in the documents referred to in the preceding paragraph of this note. Similarly, all the leases except for one listed in the "Outside Area" column, although covering non-irrigable portions of the reservation, were entered in the ledgers after 1936. See, e.g., lease I24r-415 issued to Mary E. Maxey for a gas station and lease I24r-456 issued to Callahan Construction Company for a "Piece of Ground at Pot Holes" (a site in section 25, T. 15 S., R. 23 E.). The Mary E. Maxey lease, inaccurately placed in T. 15 S. rather than T. 16 S. of R. 21 E., is undoubtedly a lease for the same ground that was utilized by Mrs. Maxey under a BIA trader's license prior to

(Footnote 11 continued)

1936. See the documents referred to in note 10 supra. The one exception is lease L-30 issued to R.E. Whitmore and S.H. Flood and listed as an "Outside Area" between 1918 and 1924. However, the land description (section 19, T. 16 S., R. 23 E. and section 35, T. 15 S., R. 23 E.) includes both irrigable and non-irrigable lands, and the lease is actually listed (under Whitmore's name) for the period from 1925 to 1927 and again in 1928 in the "Reservation" Division column, which covers the irrigable lands in the Reservation Division of the Yuma Project. The "Outside Area" listing was therefore, probably an error. The term "Reservation Division" described the irrigable lands and project works of the Yuma Project on the California side of the Colorado River, as several of the maps referred to in note 8 supra indicate. It did not cover the non-irrigable reservation lands not used for project works. Hence the use of the "Outside Area" column in the account analysis. A study of all of the entries in the "Reservation [Division]" column shows that all of them included irrigable as well as non-irrigable lands, and the leases were no doubt for a portion of the irrigable lands. The land descriptions in the analysis ordinarily give at most the section in which the lease was contained, without providing any more precise description. Where more precise descriptions are given, they refer to specific lots or farming units in the Bard area opened to non-Indian settlement in 1910. See, e.g., leases I1r-372, L-14, and 4-11. Other leases are in sections which are entirely, or practically entirely, irrigable. See, e.g., leases I24r-202, I24r-305, I24r-307, I24r-354. Lease I24r-409 was for a "track on levee in Cal. in Res. Div." One lease whose land description defies accurate interpretation is the lease originally issued to E.F. Sanguinetti under lease number I24r-169 and described as sections 31,36,1,6 in townships 15,15,16 and ranges 23, 22E. It is not clear which sections are to be matched with which townships and which ranges. Some of the probable combinations would include sections which contain only non-irrigable lands, but all of these would also contain substantial project works, except for section 6, T. 16 S., R. 22 E., which is high up in the rocky mesa and useless for farming or grazing. Considered as a whole, however, the account analysis supports BIA jurisdiction over the non-irrigable lands prior to 1936.

In addition to this formal evidence of administration, there are many informal recognitions of the continued inclusion of the non-irrigable lands within the Indian reservation. Both the Commissioner of Indian Affairs and the Director of the Reclamation Service described the Yuma Project as encompassing only "the bottom lands in the Yuma Indian Reservation," 12/ and the chief officers of the two bureaus repeatedly referred to the non-irrigable lands as "Indian country within the meaning of the law," 13/ "Indians lands . . . [which] are not public lands in the ordinary sense of the word," 14/ and lands the disposal of which "is primarily within the control of the Indian Office." 15/

12/ Fifth Annual Report of the Reclamation Service: 1906, at 100 (1907) (emphasis added); Letter dated February 28, 1906, from the Commissioner of Indian Affairs to the Secretary of the Interior (Yuma Project File 154-A, "Indian Lands," A609694). A letter dated July 18, 1913, from Reclamation Service Yuma Project Engineer Sellew to supervising engineer Hill enclosed three prints of a map showing "the entire Indian Reservation," including as one subdivision thereof "the area allotted to the Indians, amounting to about 8,200 acres" (Yuma Project File 154-A, "Indian Lands, 1910 thru June 1919," A609380, A609382-84).

13/ Letter dated October 1905, from Acting Commissioner of Indian Affairs Larabee to the Director, U.S. Geological Survey (in which the Reclamation Service was originally located), concerning police jurisdiction over the non-irrigable lands on the California side of the Colorado River being used for construction of the Laguna Dam (Yuma Project File 154-A, "Indian Lands," A609664-65).

14/ Copy of memorandum dated March 21, 1925, from Acting Chief Engineer Crowe, Bureau of Reclamation, to the Commissioner of Reclamation, concerning an application by Southern Sierras Power Company for a right of way "west of the east line of Sec. 19, T. 16 S., R. 22 E., S.B.M.," which would be "across Indian lands over which the Bureau of Reclamation has proposed to construct certain works in connection with the All-American Canal to Imperial Valley." (Yuma Project File 430, "Acquisition of Lands, Indian Lands thru 1929").

15/ Letter dated June 23, 1914, from Director Newell, Reclamation Service, to U.S. Representative Carl Hayden (Yuma Project File 154-A, "Indian Lands, 1910 thru June 1919," A609414).

More particularly, the non-irrigable lands between the reservation levee and the Colorado River are expressly recognized as being reservation lands subject to the jurisdiction of the Indian Bureau, except insofar as such lands were necessary for the protection of the levee. In a letter dated May 28, 1906, District Engineer Homer Hamlin advised the Director of the U.S. Reclamation Service that "[t]he jurisdiction over this land will probably always remain with the Indian Bureau, as it will not be reclaimed or sold as a part of the cultivable area of the Yuma Project." 16/ In 1907, Superintendent Deaver of the Yuma Reservation raised the question of the status of these lands, as well as the "27000 acres of rough mesa and mountainous land unfit for agricultural purposes," in light of the failure of Congress, in the Act of April 21, 1904, to "provide for the disposition of the balance of the reservation that is not irrigable." 17/ The Secretary of the Interior directed Special Inspector Levi Chubbuck of the U.S. Indian Inspection Service to investigate and report on this and other matters. On April 6, 1907, Inspector Chubbuck reported to the Secretary, suggesting that the strip of land between the levee and the river "be formally reserved by the Indian Office" and that a parallel strip inside the levee which was not to be allotted to Indians or disposed of to non-Indians, as well as "other available places on the Yuma Reservation," be planted with fruit bearing trees, "subject to such regulations as the Reclamation Service desires to impose for the protection of the levees and ditches, the Indians' rights to the income from the products being recognized, in consideration of the fact that the reservation as a whole is theirs." 18/ In 1919, the Director of the Reclamation Service implicitly recognized the right of the Indian Office to irrigate "some lands in Sec. 25, T. 16 S., R. 22 E., which lie outside of our levee and consequently are not included

16/ Yuma Project File 154-A, "Indian Lands," A609709-11. See id. A609702-13 for related Secretarial level correspondence.

17/ Letter dated April 11, 1907, from Superintendent Deaver, Yuma Reservation, to the Commissioner of Indian Affairs, referred by the latter to the Director of the Reclamation Service on May 7, 1907 (Yuma Project File 154-A, "Indian Lands," A609721-28).

18/ Yuma Project File 154-A, "Indian Lands," A609734-39.

within the proposed Yuma project." 19/ And in a letter dated October 20, 1929, the General Land Office advised the Commissioner of Indian Affairs that:

> It is the opinion of this office that the reservation boundary is defined by the center of the abandoned channel (as it existed prior to the avulsive change of 1920) . . . . The area between the levee and the abandoned channel, constituting the present Yuma Indian Reservation boundary, appears therefore to be still in public ownership and a part of the Indian Reservation.

In fact, the jursidiction of the Bureau of Indian Affairs over the non-irrigable lands of the 1884 reservation was not challenged, insofar as the available documents show, until July 15, 1935, during the final stages of approval of the right of way for the All-American Canal. The canal was originally proposed as a private project, passing through the 1884 reservation from the southwest corner to the northeast corner, crossing allotted and unallotted Indian lands, mostly the latter. The entire right of way route was considered to be within the reservation, so that compensation would have to be paid to the Indians for both the allotted and unallotted lands. 20/ When the Reclamation Service decided to construct the canal itself, it shifted the right of way slightly north so that only tribal lands would be involved, and, in a letter dated June 27, 1934, requested the General Land Office to submit the proposed right of way for the canal, which would involve no Indian allotments but rather "exceedingly rough territory along the edge of the Yuma mesa," to the Secretary of the Interior "(through the Commissioner of Indian Affairs) for approval under Section 13 of the Act approved June 25, 1910 (36 Stat. 855, [858, 43 U.S.C. §148])," and act applying to "lands within any Indian reservation" and hence, as the Commissioner

19/ Letter dated October 2, 1919, from Director Davis, U.S. Reclamation Service, to the Commissioner of Indian Affairs (Yuma Project File 150, "Acquisition of Lands, Southern Pacific Ry. Co.").

20/ See, e.g., "Right of Way Plats of the All American Canal through Tribal and Allotted Indian Lands of the Yuma Indian Reservation," dated January 1928; "Schedule of Appraisements Covering Right-of-Way Across Yuma Indian Reservation, Etc.," covering unallotted lands therein, signed April 27, 1928 (Claims Exhibits RO-7, RO-10).

of the General Land Office noted in his transmittal letter to the Commissioner of Indian Affairs dated July 5, 1934, administered by the Office of Indian Affairs. The Commissioner of the General Land Office also stated that "the right of way involves Indian lands." 21/ The Reclamation Service's reversal of position in 1935 seems to have been prompted by its receipt of a report dated March 12, 1935, making substantial claims for compensation and consideration on behalf of the Quechan Indians. 22/ The resulting dispute led to the 1936 Solicitor's Opinion.

Although Congress did not deal with these lands between 1894 and 1936 in any manner which would reveal its understanding of their status, there is a statement in the Congressional Record 23/ by Representative Stephens of Texas on December 6, 1912, approximately two years after Congress enlarged the allotments to 10 acres, and near the time when the canal constructed through the reservation was completed, implying that the "large amount of land up on the mesa" (that is, most of the "non-irrigable" lands which are affected by this Opinion) was in Indian ownership at that time. And, during hearings in San Diego, California, on June 29, 1934, Chairman Wheeler of the Senate Comittee on Indian Affairs referred to "the All-American Canal constructed in connection with the Boulder Dam project and running across the lands of the Indians down there [in the Yuma Indian Reservation]" and told John Curran, a Yuma Indian concerned about compensation for the right of way, "They will have to pay you for it, if they take your land." 24/

21/ Claims Exhibit RO-7. See in addition the Bureau of Reclamation document cited in note 14 supra.

22/ Id.

23/ 49 Cong. Rec. 748.

24/ Survey of Conditions of the Indians in the United States, Hearings before a Subc. of the Senate Comm. on Indian Affairs, pt. 33, 73d Cong., 1st Sess. 17245 (1935). See id., pt. 2, 70th Cong., 2d Sess. 628-29 (1929) (reference to lease of Quechan tribal lands).

Solicitor Austin's 1977 Opinion devotes much effort to establishing that the Department's administrative practices with respect to these lands were inconsistent at best. After carefully reviewing his discussion, it seems clear that the isolated deviations do not alter the fact that this Department treated the non-irrigable acreage as belonging to the Indians.

An example of why the 1977 analysis of administrative practices is unpersuasive can be found on page 29 of that Opinion where Solicitor Austin quotes a 1903 letter from the Commissioner of Indian Affairs on the subject of the non-irrigable lands. The quoted language, however, is taken somewhat out of context as can be seen from the remainder of the Commissioner's discussion which is found in footnote 16. Taken as a whole, the Commissioner's statement does not offer strong support for the proposition that the non-irrigable lands had been ceded. Secondly, Solicitor Austin cited a series of letters by government officials, giving their opinion of the effect of the 1893 agreement. However, such statements appear to me to be more in the nature of gratuitous comments, rather than researched legal opinions, and they do not deal with the essential issue of how the lands were administered. In fact, the comments quoted appear to be confused on the point of whether the non-irrigable lands were public domain lands. And, as Solicitor Austin then stated on page 31 of the 1977 opinion:

> . . .there is a great deal of administrative material that indicates that the subject of non-irrigable lands were administered as Indian lands or were at least, considered to be a part of the Yuma Reservation subsequent to 1894. In some cases, it will be noted that some of the same officers who determined that the Indians had ceded the subject lands also dealt with administrative details pertaining to those lands as though they were Indian lands.

Thirdly, the 1977 Opinion relies strongly on the Warboys survey in 1928 as evidence of the government's view of the current reservation boundaries. However, it has been pointed out that the surveyor's notes 25/

25/ Field Notes of Survey executed by John L. Warboys, under Special Instructions of May 14, 1928, Group No. 152.

indicate that the surveyor was not instructed to or attempting to define the reservation boundaries, as affected by the cession agreement. Moreover, Warboys' comment, cited by Solicitor Austin, only dealt with the status of irrigable lands and not of the non-irrigable lands. Therefore, the survey does little to persuade one that it reflected the government's view of the continuing status of the non-irrigable lands. A last example of the unpersuasive line of argument taken to discredit evidence of administrative practices is the statement that the cession of the non-irrigable lands was not entered on the tract books until the 1960's which may explain why the lands were administered as Indian lands. The non-entry in the tract books does more to suggest that the government did not consider the non-irrigable lands ceded than it does to diminish the impact of administrative treatment as tribal lands.

I am persuaded that the administrative treatment reflects what must have been the prevailing view that the lands had not been separated from the reservation. Even if there were some inconsistency, such inconsistency does not detract from the legal significance of an undeniable pattern of administration of the lands as tribal lands. In any event, neither the executive nor the legislative branches of the government treated the 1893 Agreement and the 1894 Act as having worked an immediate cession of any reservation lands or termination of the reservation. 26/

In conclusion then, it appears far more likely than not, considering the actual language of the documents, the stated purpose of the Indians, the circumstances surrounding the negotiation of the agreement, the fact that the agreement was negotiated under the authority and therefore prescribed compensation terms of the General Allotment Act, and the overwhelming evidence of continuing treatment of the subject lands as reservation lands, that an immediate automatic cession of the irrigable and non-irrigable lands was not intended by either party to the agreement. Rather, it seems more logical that the cession of the reservation lands was contingent upon what the Indians perceived as adequate compensation — allotment to them of irrigable lands, sale of their surplus lands under profitable terms, the proceeds to be held in trust for the Tribe, the construction of an irrigation canal, and the opening of the area to

26/ In 1900, both the Department of the Interior and the President felt it was necessary to issue an executive order (dated December 19, 1900) to withdraw certain lands in the then Territory of Arizona from the reservation by revoking the 1884 Executive Order as to those lands.

settlement. I can find no legal or factual basis for separating the non-irrigable lands from the irrigable lands and deciding that the non-irrigable lands were not subject to fulfillment of such conditions. Indeed, strong argument can be drawn from the non-irrigable acreage section that cession of those lands was specifically tied to the condition that the area be returned to the public domain by executive order, opened to settlement and the tribe compensated as the lands were sold to settlers. 27/

I believe that the foregoing interpretation of the agreement comports with the previously cited canons of construction relating to Indian agreements and statutes, in that it considers all relevant circumstances to determine what the parties intended and it resolves what may be ambiguous in the Indians' favor. Moreover, this interpretation is appropriate in light of the well established legal principle that Congressional action terminating or altering Indian property rights is not to be lightly inferred. Such Congressional intent must be clear. 28/ Indeed, this interpretation is so well founded on the available information that to espouse the opposite interpretation, that the Indians ceded the non-irrigable lands for virtually no consideration, would violate this Department's obligation as trustee to follow an ordinary fiduciary standard in dealing with Indian property rights. Seminole Nation v. United States, 316 U.S. 286 at 279 (1942).

27/ Although the 1894 Act does not provide as detailed a description of the various duties of the government as trustee as was the case in Ash Sheep Co. v. United States, 252 U.S. 159 (1920), some form of trusteeship status may be imputed to the government over the Indian land until the fulfillment of the stated condition. While the 1936 Opinion recognizes that the agreement can be construed as conditional, Solicitor Margold concluded that the opening of the non-irrigable land was not a material condition. But, the fact that the requirement appears in the Agreement and is expanded in the Act indicates its importance to the Indians and to Congress. Otherwise, the parties could merely have stated that the land was ceded to the United States or placed in the public domain. Second, one policy of the General Allotment Act of 1887, 24 Stat. 388, which statute we have been recently told by the Supreme Court is relevant to the understanding of Indian legislation of the period (Mattz v. Arnett, 412 U.S. 481 (1973)), was to further the assimilation of Indian tribes into the non-Indian community. The condition of opening the lands to non-Indian settlement was, then, essentially part and parcel of a primary national policy with respect to Indians at the time.

28/ Menominee Tribe v. United States, 391 U.S. 404 (1968).

As the foregoing discussion of the government's intent regarding the non-irrigable lands has demonstrated, the Government's intent and subsequent administration of the agreement and legislation certainly do not substantiate the interpretation that Congress intended to take title to those lands. There is no room, moreover, for asserting that the conditions of the agreement and ratifying statute were fulfilled, in any way, during the decade following the enactment of the ratifying statute. Therefore, no cession of the reservation lands became effective during that period.

The 1904 Act

The second legal issue on which correct resolution of the title question turns is whether, as the 1977 Opinion holds, the 1904 Act providing an allotment and irrigation scheme for both the Fort Yuma and Colorado River Reservations, was intended to implement the 1893 agreement and ratifying statute by fulfilling the United States' obligations undertaken in that agreement. The 1904 Act does not, as explained below, evidence Congressional intent to fulfill the conditions of the cession agreement and 1894 statute and to execute the cession of all the reservation lands, including the non-irrigable acreage. The case is more compelling, based on the language of the act, as well as its legislative history, that Congress intended to create an entirely new scheme for the irrigation of the area under which there was no cession of "non-irrigable" lands. The language and entire purpose of the 1904 Act were restricted to allowing the "irrigable" reservation lands to be developed under the Reclamation Act of 1902 and the Act should not be interpreted as either a repeal or an implementation of the 1894 statute.

The Act of April 21, 1904, Sec. 25, 33 Stat. 224, states:

> That in carrying out any irrigation enterprise which may be undertaken under the provisions of the reclamation Act of June seventeenth, nineteen hundred and two, and which may make possible and provide for, in connection with the reclamation of other lands, the reclamation of all or any portion of the irrigable lands on the Yuma and Colorado River Indian reservations in California and Arizona, the Secretary of the Interior is hereby authorized to divert the waters of the Colorado River and to reclaim, utilize, and

> dispose of any lands in said reservations which may be irrigable by such works in like manner as though the same were a part of the public domain: Provided, That there shall be reserved for and allotted to each of the Indians belonging on the said reservations five acres of the irrigable lands. The remainder of the lands irrigable in said reservations shall be disposed of to settlers under the provisions of the reclamation Act; Provided further, That there shall be added to the charges required to be paid under said Act by settlers upon the unallotted Indian lands such sum per acre as in the opinion of the Secretary of the Interior shall fairly represent the value of the unallotted lands in said reservations before reclamation; said sum to be paid in annual installments in the same manner as the charges under the reclamation Act. Such additional sum per acre, when paid, shall be used to pay into the reclamation fund the charges for the reclamation of the said allotted lands, and the remainder thereof shall be placed to the credit of said Indians and shall be expended from time to time, under the direction of the Secretary of the Interior, for their benefit.

In 1911, the statute was amended to provide for 10-acre rather than 5-acre allotments. Act of March 3, 1911, 36 Stat. 1063.

As in the case of the 1893 agreement and 1894 ratifying statute, the face of the 1904 Act does not compel any one interpretation concerning the effect of the Act on the cession of the non-irrigable lands. The language of the 1904 statute does not refer to the 1893 Agreement or to the status of non-irrigable lands. In fact, the statute does not limit its focus to the Fort Yuma Reservation but includes the Colorado River Reservation. The Act, moreover, authorizes a substantial reclamation project intended to include both Indian and non-reservation lands. The Act states that the Yuma project would take place "in connection with the reclamation of other lands." Furthermore, the 1904 Act, which does not refer to the non-irrigable lands, provides for different allotment and surplus land sale procedures from those agreed to by the parties in 1893 and subsequently ratified by Congress.

The 1894 Act provided for the United States to bear the cost of surveying and appraising the surplus irrigable lands and to sell the lands at public auction with the proceeds from sale of these lands to be placed in a fund, with interest at 5% per annum, for the benefit of the Indians. The 1894 Act also provided that the private canal company, which was given three years to commence construction, must for ten years provide free water for one acre for each male adult Indian utilizing that water for growing crops. The canal company was also to bear the cost of canal construction. The 1904 Act, by contrast, made no provision for free water. It also credited to the Indians only that portion of the proceeds of sale as surplus irrigable land reflecting the value of the land before reclamation. Otherwise, the "surplus" irrigable lands were simply opened to settlement under the homestead laws, rather than being sold by the more favorable procedure of a public auction. The only other charges were for construction of the reclamation projects and these were not payable to the Tribe. Moreover, out of the amount the Tribe did receive under the 1904 Act, there would be taken the sum required to pay the reclamation charges for the land allotted to the Indians, a sharp contrast to the canal being constructed free of charge in the 1894 Act. Any balance remaining was held in a fund for the benefit of the Indians without provision for interest, as contrasted to the five percent interest provided in the 1894 Act.

Reference to the legislative history is helpful and appropriate in construing the scope of the Act. The 1904 Act was proposed by the Department. The Senate Report records in the letter of the Director of the Geological Survey, also read into the Congressional Record, 29/ to the effect that the 1893 Agreement and 1894 Act had created a scheme for irrigation which never was realized, and that Congress was not to be restricted by the prior Agreement and Act, including the failure of the canal venture. This letter made specific reference to two contemporaneous Supreme Court decisions establishing that Congress was not bound by such agreements but "has full power to dispose of the Indian lands in such manner as it may consider best fitted for the benefit of the Indians." 30/ The Senate Report then records a letter from the Commissioner of Indian Affairs which states that:

29/ 38 Cong. Rec. 2811.

30/ Cherokee Nation v. Hitchcock, 187 U.S. 294 (1902) and Lone Wolf v. Hitchcock, 187 U.S. 553 (1902), cited in 58th Cong. 2d Sess., Senate Report No. 1660 at 28.

> The problem of providing these two reservations with irrigation systems is one which this office has thus far been unable to solve, and it therefore gives its hearty assent to the proposition of the Director of the Geological Survey, and earnestly recommends its adoption, believing that it promises relief to these Indians. 31/

A purpose, stated in the legislative history for bringing a reclamation project to the reservation was to construct a "portion" of a "general" and comprehensive system of utilizing the waters of the river to the best possible advantage". 32/

It appears that some material in the legislative history might be susceptible of divergent interpretations. For example, the reference to the Yuma Indians' having already assented to allotments of five acres each ties the 1904 Act to the 1894 statute. But, I think that does little more than indicate what is already clear, that is, that Congress was aware of the 1894 statute. It does not compel the conclusion that the 1904 Act was an implementation of the prior act and cession agreement, with all the ramifications thereof. In addition, the letter from the Director of The Geological Survey, referred to above, might be interpreted as evidence of Congressional intent to implement the Act and cession agreement. But, the discussion in that letter is more susceptible to the interpretation that Congress believed it did not have to take action to acquire Indian land title before disposing of such land. In other words, effectuation of the cession agreement was not at all necessary for Congress to accomplish its stated purpose in 1904, namely provision of irrigation on the reservation as part of a major reclamation project involving the Colorado River. When it is clear that Congress knew it did not have to acquire Indian lands by cession before it could dispose of them, the burden of proving that Congress intended to effectuate a cession becomes more difficult. This is particularly true in the case of these non-irrigable lands which were nowhere mentioned in the Act or in the Director's letter.

31/ Id. at 29.

32/ Id. at 38.

In addition to the legislative history, the administrative practices, detailed earlier in this Opinion, support the interpretation that the title to the non-irrigable lands was not affected by this enactment.

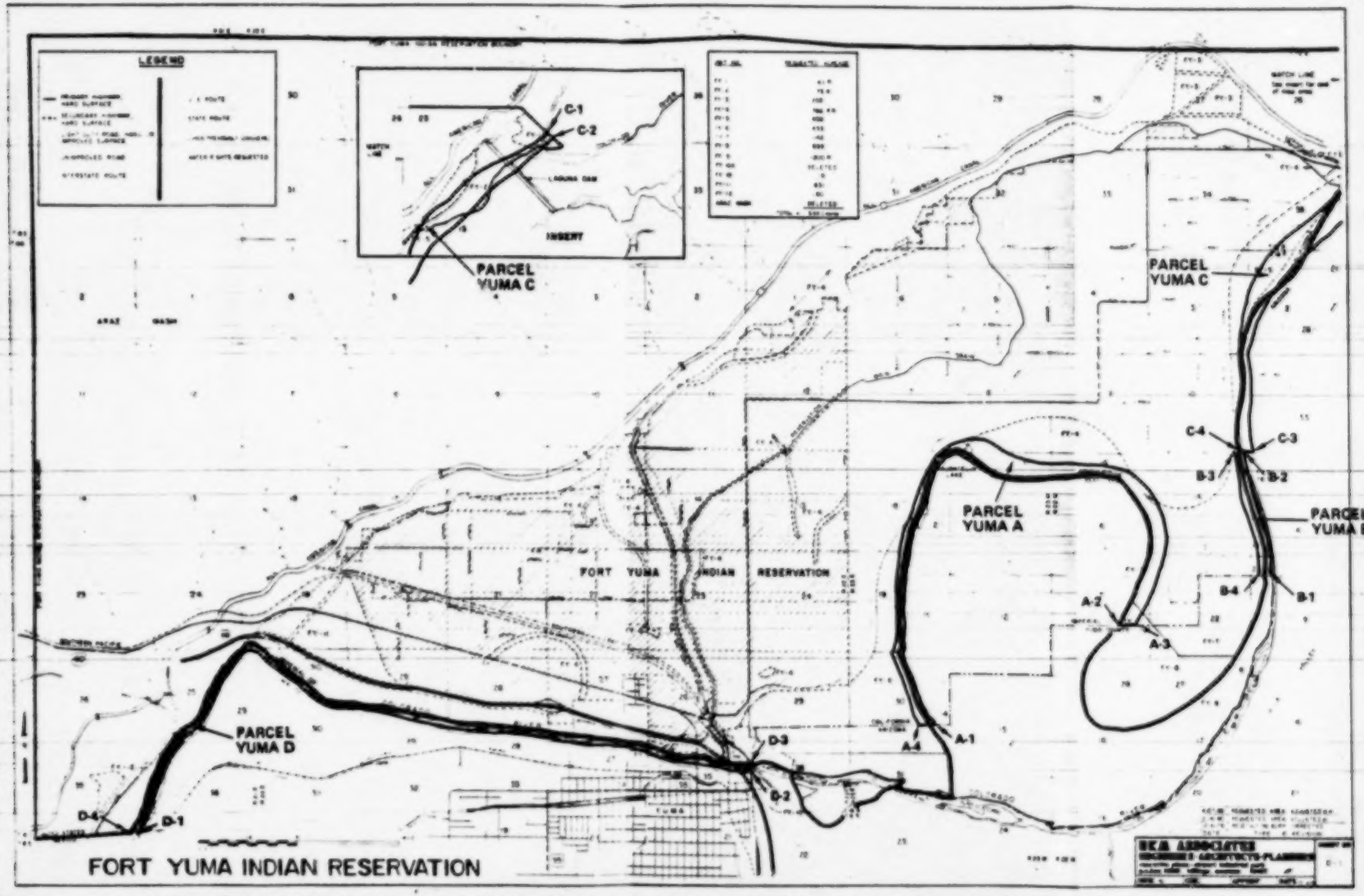
In conclusion, interpreting the 1904 Act as an intended implementation of the cession agreement has little, if any, support in either the language, the legislative history, or subsequent administrative practice. Such interpretation would not conform with the applicable rules for interpreting Indian statutes, 33/ particularly the rule that the cession of Indian property rights may not be lightly inferred. I think the interpretation which follows the language and stated purpose of the 1904 Act most closely is that the Act was not intended to implement and give legal effect to the agreement for the cession of the Port Yuma lands. Rather, the non-irrigable lands were not affected in any practical way by that Act. Therefore, the conditional cession of the non-irrigable lands remained uneffected and title to those lands remains in the Quechan Tribe.

In the preceding discussion, I have explained why I have concluded that the Agreement and the 1894 statute must be construed as providing for a conditional conveyance of the non-irrigable lands; the 1904 Act did not, contrary to the 1977 opinion of the Solicitor, implement the 1893 Agreement and ratifying act. As a consequence, that conveyance was not validly effected. The 1977 opinion is overruled. Title to the subject property is held by the United States in trust for the Quechan Tribe. That title, however, is subject to interests which have vested in third parties as noted above.

Leo Krulitz

LEO M. KRULITZ

33/ See cases cited in footnote 3, supra.



APPROXIMATE BOUNDARIES OF AREAS TO BE EXCLUDED FROM FORT YUMA INDIAN RESERVATION

October 1981 EXHIBIT 4

Headquarters Military Division of the Pacific
San Francisco, Cal. March 12, 1870.

Adjutant General U. S. Army,
Washington, D. C.

Sir:

I have the honor to transmit herewith plats of the following named Reservations in Arizona and request that they may be declared in accordance with the limits herein given.

Camp Mojave

Commencing at a post marked U.S. in a mound of earth situated N. 83° 31' 37" E. 68.99 chains distant from the Flag staff at the Post. Thence variation 14° 08' 28" East. South 33° 08' 28" W 240.00 chains to a post marked U.S. in a mound of sand. Thence N. 56° 51' 32" W. 232.60 chains to a post marked U.S. in mound of coarse gravel. Thence N. 33° 08' 28" E. 240.00 chains to a post marked U.S. in a mound of coarse gravel near the West bank of Beaver Lake. Thence S. 56° 51' 32" E. 232.60 chains to the point of commencement. The said boundaries containing 5582 acres 1 rood 24 perches, a little more or less.

Camp Mojave

Reservation for Hay and Wood.

Commencing at a post marked U. S. in mound of earth situated S. 10° 43' 41" E. 347.52 chains distant from the Flag Staff at Camp Mojave and about 20

EXHIBIT 5

chains S.W. from the point where the road crosses the top of the Mesa. Thence variation 14° 08' 28" East. S. 1° 04' 28" W. 272.50 chains to a post marked U.S. in mound of earth near the Quartermasters Corral. Thence S. 76° 17' 28" W. 228.50 chains to a post marked U.S. in mound of earth near the left bank of the Colorado River. Thence N. 23° 01' 32" W. 362.70 chains to a post marked U.S. in a mound of earth near the left bank of the Colorado River. Thence S. 88° 45' 32" E. 369.00 chains to the post at the point of commencement. The said boundaries containing 9114.81 acres, more or less. And the intermediate tract lying between the Hay and the Post Reservation, bounded on the West by the Colorado River and on the East by a line running from Station I of the Hay and Wood Reserve to Station I of the Post Reserve.

Camp Verde

Commencing at a post in mound of stones situated S. 70° 09' 56" E. 82.16 chains distant from the eastern-most chinmey of the building used as Company Quarters at the Post, and on a rocky bluff near an old Ruin. Thence variation 13° 48' 04" East. N. 31° 11' 56" W. 246.47 chains to a post marked U.S. in mound on South West slope of hill. Thence S. 53° 48' 04" W. 110.00 chains to a post marked U.S. in mound of earth in open grass land. Thence S. 31° 11' 56"

E. 246.47 chains to a post marked U.S. in mound of earth in open grass land, which post bears from the easternmost chimney of the building used as Company Quarters at the Post, S. 7° 03' 04", E. 93.55 chains distant. Thence N. 53° 48' 04" E. 110.00 chains to the post at the point of commencement. The said boundaries containing 2770.81 acres more or less.

Camp Date Creek

Commencing at a post marked U.S. in a mound of earth and stones on the top of a spur sloping West and N. 48° 56' 30" E. 176.67 chains distant from the eastern gable of the Hospital building at the Post. Thence variation 12° 46' 30" East S. 72° 41' 30" W. 426.15 chains to a post marked U.S. in mound of earth on a spur sloping south. Thence S. 1° 16' 30" W. 132.00 chains to a post marked U.S. in mound of stones on the West side of a small ravine. Thence N. 72° 41' 30" E. 426.15 chains to a post marked U.S. in mound of stones among granite boulders and which bears from the eastern gable of the Hospital building S. 83° 40' 30" E. 132.60 chains distant. Thence N. 1° 16' 30" E. 132.00 chains to the Post at the point of commencement. The said boundaries containing 5623.90 acres more or less.

Camp McDowell — Commencing at a post marked U. S. situated on a little stony hill about 1-1/4 mile West of the River Verde. Thence variation 12° 30" East, S. 0° 45', W. 560 chains to a post marked U.S. in a dry arroyo with gentle banks. Thence S. 89° 15' E. 160.00 chains to a post marked U.S. in a small valley from which a blazed Mesquite bears S. E. 15 feet distant. Thence N. 0° 45', E. 560.00 chains to a post marked U.S. on the South bank of a small valley. Thence N. 89° 15' W. 160.00 chains to the post at the point of commencement. The said boundaries containing 8960 acres a little more or less.

Camp Grant — Commencing at a post marked U.S. in a mound of earth on a spur sloping S.W. and which post bears N. 5° 40' 30". W. 116.71 chains distant from the Flag Staff at the Post. Thence variation 12° 32' 00 East, S. 23° 28' E. 237.00 chains to a post marked U.S. in a mound of earth on top of the Mesa, and about 3 chains south of the left bank of a ravine, and which post bears from the Flag Staff at the Post S. 64° 10' E. 130.67 chains distant. Thence S. 68° 32' W. 85.78 chains to a post marked U.S. in a mound of earth on the N. W. side of a dry wash. Thence N. 23° 28' W. 237.00 chains to a post marked U.S. in a mound of earth on top of a spur sloping N.E. Thence N. 68° 32'

E. 85.78 chains to the post at the point of commencement. The said boundaries containing 2031.70 acres a little more or less.

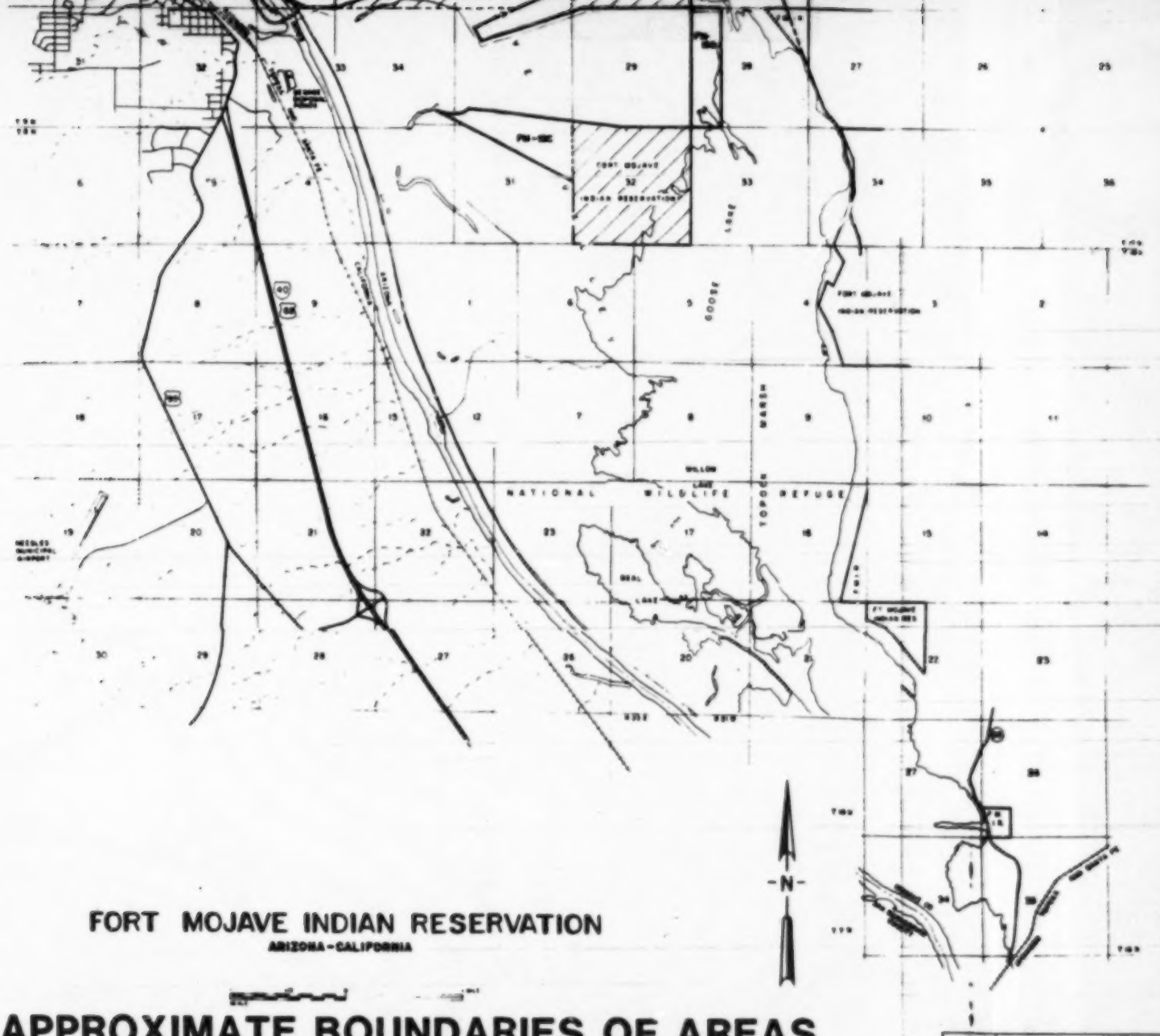
Camp Bowie — Commencing at a post marked U.S. in a mound of stones on top of a rocky spur course about N. E. and which post bears S. 80° 19' 01", E. 18.28 chains distant from the point fixed for the site of the Flag Staff at the Post. Thence variation 11° 07' 59" East, S. 64° 49' 59" W. 80.46 chains to a post marked U. S. in a mound of stones on top of a spur sloping North and which post bears S. 55° 45' 59", W. 66.28 chains distant from the point fixed for the site of the Flag Staff at the Post. Thence N. 28° 10' 01" W. 95.66 chains to a post marked U.S. in a mound of earth on a low spur sloping east and about 5 chains South from the new road to Tucson. Thence N. 64° 49' 59", E. 80.46 chains to a post marked U.S. in a mound of stones and earth on the North side of a spur sloping West and about 5 chains from the road leading through the old pass to Camp Goodwin. Thence S. 28° 10' 01" E. 95.66 chains to the post at the point of commencement. The said boundaries containing 768.83 acres a little more or less.

Camp Crittenden — Commencing at a post marked U.S. in a mound of earth on top of a spur sloping S.W. and which bears N. 69° 02' 21" E. 100.38 chains from the N. W. corner of the

Guard house at the Post. Thence variation 12° 14' 21" East, S. 34° 56' 21" W, 238.91 chains to a post marked U.S. in mound of earth on top of a low ridge course S.W. Thence N. 86° 17' 39" W. 160.50 chains to a post marked U.S. in a mound of earth on the top of a high spur. Thence N. 34° 56' 21" E. 238.91 chains to a post marked U.S. in a mound of earth on top of a spur sloping S.E. about 10 chains East of a wood road and which post bears N. 55° 08' W. 80.95 chains from the N. W. corner of the Guard House at the Post. Thence S. 86° 17' 39" E. 160.50 chains to the post at the point of commencement. The said boundaries containing 3278.08 acres more or less.

These are all the plats of posts in Arizona of which surveys have been made and at which Reservations have not yet been declared, excepting Toll Gate, and the new post proposed to be located in the Pinal Mountain Region when Camp Goodwin shall have been broken up. These last will be surveyed and the plats forwarded as soon as possible.

Camp Colorado is believed to be on an Indian Reservation, at all events it is now garrisoned by a detachment stationed at the Indian Reservation buildings for the protection of the Agents and employees, and is not needed except as an Indian Reservation.

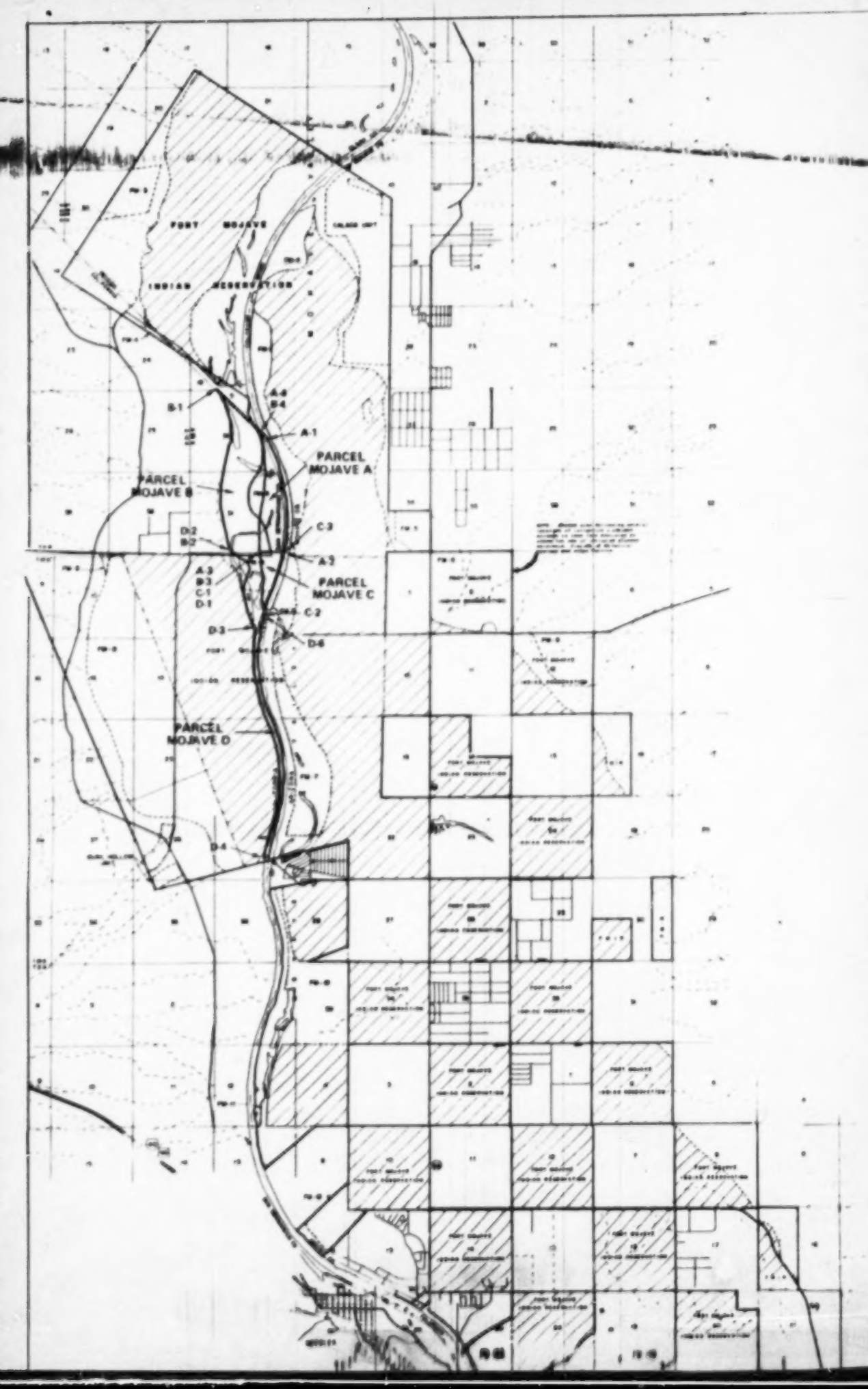


FORT MOJAVE INDIAN RESERVATION
ARIZONA-CALIFORNIA

APPROXIMATE BOUNDARIES OF AREAS TO BE EXCLUDED FROM FORT MOJAVE INDIAN RESERVATION

October 1981

EXHIBIT


FORT MOJAVE
INDIAN RESERVATION
B-1
A-4
B-4
A-1
PARCEL MOJAVE A
PARCEL MOJAVE B
D-2
B-2
C-3
A-2
A-3
B-3
C-1
D-1
PARCEL MOJAVE C
C-2
D-3
D-6
PARCEL MOJAVE D
D-4

EXECUTIVE MANSION, *May 15, 1876.*

Whereas an Executive order was issued November 16, 1874, defining the limits of the Colorado River Indian Reservation, which purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3, 1865, and Executive order dated November 22, 1873; and whereas the order of November 16, 1874, did not revoke the order of November 22, 1873, it is hereby ordered that all lands withdrawn from sale by either of these orders are still set apart for Indian purposes; and the following are hereby declared to be the boundaries of the Colorado River Indian Reservation in Arizona and California, viz:

Beginning at a point where La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning.

U. S. GRANT.

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

Memorandum

JAN 17 1969

To: Director, Bureau of Land Management
Through: Assistant Secretary, Public Land Management

From: Secretary of the Interior

Subject: Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California

I have this date received a memorandum from the Solicitor regarding the proper location of the boundary of the Colorado River Indian Reservation in the subject reach. A copy of his memorandum is attached. Acting upon the conclusions expressed in the memorandum, I have determined that certain surveys of record in your Bureau should be suspended and other surveys reinstated so as to correctly show the interest of the Colorado River Indian Tribes in certain lands.

The presently monumented boundary of the reservation in the reach between Riverside Mountain and the Colorado River is shown on the plat of survey for T. 2 S., R. 23 E., S.B.M., approved November 20, 1913. I have concluded that this survey did not correctly locate the boundary line in this reach because it did not conform to the call of the Executive Order of May 15, 1876, that the boundary should be a direct line from the top of Riverside Mountain, California, toward the place of beginning to the west bank of the Colorado River. I have determined that the above-mentioned plat of survey should be suspended. The proper position of the reservation boundary should be a line from the highest point on Riverside Mountain to the meander corner common to fractional sections 25 and 36, T. 2 S., R. 23 E., S.B.M., as shown on the plat of survey of this township approved May 22, 1879, and reestablished by the dependent resurvey of the same township reflected on the plat of survey accepted July 22, 1958.

I have also determined that the proper location of the reservation boundary from section 25, T. 2 S., R. 23 E., S.B.M., through section 12, T. 5 S., R. 23 E., S.B.M., is along the meander lines shown on the plats of survey in Tps. 2, 3 and 4 S., R. 23 E., S.B.M., approved May 22, 1879, and T. 5 S., R. 23 E., S.B.M., approved December 28, 1874, all as reestablished by the dependent resurvey of these townships reflected on the plats of survey accepted July 22, 1958.

EXHIBIT 11

1961, accretion surveys of lands now lying between the aforementioned meander lines of 1874 and 1879 and the west bank of the Colorado River were undertaken in Tps. 3 and 4 S., R. 23 E., S.B.M., and T. 5 S., Rs. 23 and 24 E., S.B.M. Plats thereof were accepted on May 21, 1962. By your letter of January 27, 1964, to the State Director at Sacramento, California, you ordered that the plats of survey in Tps. 3 and 4 S., R. 23 E., S.B.M., be suspended as to the sections 36 in these townships. Thereafter, correction surveys of those sections 36 were undertaken which apportioned to them certain accretion lands. Plats of these correction surveys were accepted on October 28, 1964.

In light of the conclusion that the reservation boundary in the subject reach is along the meander lines established in 1874 and 1879, accretions to this boundary are lands of the United States held in trust for the Colorado River Indian Tribes. Thus the correction surveys, accepted October 28, 1964, apportioning accretion lands to the sections 36 are incorrect and should be suspended. Also the 1962 accretion surveys in Tps. 3 and 4 S., R. 23 E., S.B.M., should be reinstated in their entirety.

Please take such action as may be appropriate to reflect the conclusions herein stated, including suspension and reinstatement of plats. Also please note the official records accordingly so that henceforth such records will indicate the proper location of the boundary of the Colorado River Indian Reservation in the subject area.

(sgd) Stewart L. Udall

Attachment

: Secretary's Files
Solicitor's Files
Secretary's Reading Files (2)
Commissioner of Indian Affairs (2)
Regional Solicitor, Los Angeles (2)
Assistant Solicitor, ILA
Mrs. Ellengoben, ILA
Associate Solicitor, IA

NEHelliot:cmm ah:1/16/69

EXHIBIT 11

IN REPLY REFER T

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

90-1-5-C69(4154

Memorandum

JAN 17 1969

To: Secretary of the Interior

From: Solicitor

Subject: Western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, through section 12, T. 5 S., R. 23 E., S.B.M., California

This is in response to your request that we review and define the location of the western boundary of the Colorado River Indian Reservation from the top of Riverside Mountain, California, to its intersection with the line between the second and third tiers of sections in T. 5 S., R. 23 E., S.B.M., California (hereinafter referred to as from the top of Riverside Mountain through section 12, T. 5 S., R. 23 E., S.B.M., California).

The Colorado River Indian Reservation was established by the Act of March 3, 1865, 13 Stat. 541, 559. Subsequently, its boundaries were modified by the Executive Orders of November 22, 1873, November 16, 1874, May 15, 1876, and November 22, 1915. The unallotted lands of the reservation are held by the United States in trust for the Colorado River Indian Tribes. Act of April 30, 1964, 78 Stat. 188.

The Colorado River Indian Tribes have requested that the western boundary of the reservation be finally determined. Until such determination is made the leasing provisions of the Act of April 30, 1964, supra, do not extend to lands south of section 25, T. 2 S., R. 23 E., S.B.M., California.

The Executive Order which describes the portion of the boundary considered in this memorandum is as follows:

EXECUTIVE MANSION, May 15, 1876.

Whereas an Executive Order was issued November 16, 1874, defining the limits of the Colorado River Indian Reservation, which purported to cover, but did not, all the lands theretofore set apart by act of Congress approved March 3,

EXHIBIT 12

1865, and Executive Order dated November 22, 1873; and whereas the order of November 16, 1874, did not revoke the order of November 22, 1873, it is hereby ordered that all lands withdrawn from sale by either of these orders are still set apart for Indian purposes; and the following are hereby declared to be the boundaries of the Colorado River Indian Reservation in Arizona and California, viz:

Beginning at a point where La Paz Arroyo enters the Colorado River, 4 miles above Ehrenberg; thence easterly with said arroyo to a point south of the crest of La Paz Mountain; thence with said mountain crest in a northerly direction to the top of Black Mountain; thence in a northwesterly direction over the Colorado River to the top of Monument Peak, in the State of California; thence southwesterly in a straight line to the top of Riverside Mountain, California; thence in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning.

U. S. Grant

This opinion deals only with that portion of the above-described boundary from the top of Riverside Mountain through section 12, T. 5 S., R. 23 E., S.B.M., California.

As established by the Act of March 3, 1865, supra, and enlarged by the Executive Order of November 22, 1873, the Colorado River Indian Reservation was located in the Territory of Arizona and bounded on the west by the Colorado River. Lands in California were first added to the reservation by the Executive Order of November 16, 1874. The record discloses that this latter Executive Order enlarging the reservation was designed to make possible control of access to the reservation from the west and to avoid loss (transfer of land) caused by changes in the channel of the Colorado River. That segment of the west boundary of the reservation germane to this memorandum, i.e., from the top of Riverside Mountain to the west bank of the Colorado River, was described in the Executive Order of November 16, 1874, as a line " * * * [from the top of Riverside Mountain] in a Southeasterly direction to the point of beginning * * * ."

When this segment of the boundary was surveyed in 1875 by Chandler Robbins, it was ascertained that this line severed a large tract of valuable land on the east side of the river which had been reserved

EXHIBIT 12

for Indian use by the Act of March 3, 1865, supra, and the Executive Order of November 22, 1873. Because of this fact, the Indian Agent in charge of the reservation, by letter of January 31, 1876, requested the Commissioner of Indian Affairs to obtain an Executive Order changing the boundary line of the reservation between Riverside Mountain and the place of beginning, making the Colorado River the boundary line. Thereafter, by letter of May 10, 1876, from the Acting Commissioner to the Secretary of the Interior, it was recommended that the President be requested to issue an order changing this boundary line so that when it reached the west bank of the Colorado River it would follow said west bank down the river to a point opposite the point of beginning, thence to the place of beginning. Following a concurrence in the recommendation of the Commissioner of Indian Affairs by the Acting Secretary, the President issued the Executive Order of May 15, 1876. For many years the proper location of the west boundary of the reservation, as described in the Executive Order of May 15, 1876, has been in dispute.

During the trial of Arizona v. California, et al., the United States claimed water rights for an extensive area of irrigable lands along the west side of the river. California resisted the claim of the United States for any lands south of section 25, T. 2 S., R. 23 E., on the grounds that there were no such lands within the boundary of the reservation. California's contention was based upon the fact that the west bank of the river, which was the call of the west boundary of the reservation in the Executive Order of May 15, 1876, established a boundary that would change with movements of the river. The United States contended, among other things, that this Executive Order established a permanent and unchanging boundary along the west bank of the river as it existed in 1876.

The Special Master ordered that the proper position of the boundary be litigated and, following trial, the Special Master made Findings of Fact and Conclusions of Law which, in effect, held that the Executive Order of May 15, 1876, established a boundary which changes as the course of the Colorado River changes, except when such changes are due to an avulsion. He further held that two avulsive changes had severed lands from the reservation and placed these lands on the west side of the river. The effect of the Master's holding was to disallow any claim of the United States for water for lands south of section 25, T. 2 S., R. 23 E., which were located on the west side of the Colorado River except in the two areas the Master found to have been severed from the reservation and placed on the west side of the river by manmade avulsive changes in the river's course.

Before the Supreme Court, California excepted to the Findings of Fact and Conclusions of Law of the Special Master. In ruling thereon, the Supreme Court disagreed with the Special Master's decision to

determine the disputed boundary of the Colorado River Indian Reservation. Arizona v. California, et al., 373 U.S. 546, 601 (1963). The effect of the Supreme Court's decision was to leave the boundary question open for future determination.

Location of the Boundary Between Riverside Mountain and the West Bank of the Colorado River

The proper position of the first segment of the boundary from the top of Riverside Mountain to the west bank of the river presents little difficulty. The first question that arises is which of two peaks on Riverside Mountain is the top. Absent specific definition in the Executive Orders of November 16, 1874, and May 15, 1876, it is believed that the term "top of Riverside Mountain" should be given its commonly accepted meaning and, therefore, means the highest point of that mountain.

The "top of Riverside Mountain" was supposedly monumented during a survey in 1912 by R. A. Farmer; however, there is evidence that this corner was not placed on the highest point of the mountain and, therefore, does not represent the true corner of the reservation boundary. In these circumstances, the language of the Executive Orders of November 16, 1874, and May 15, 1876, must control and the erroneous Farmer survey should be suspended in the reach from Riverside Mountain to the Colorado River for reasons hereinafter stated.

It is concluded that the reservation boundary in this reach should follow a line from the highest point on Riverside Mountain on a direct bearing toward the place of beginning as described in the Executive Order of May 15, 1876, until it strikes the proper location of the west bank of the river as it existed in 1876. This line should terminate at the point it intersects the west bank. The Executive Order clearly stated the line should go to the west bank, not halfway down the bank, to the water's edge, or any other place. The bank of a river is the water-washed and relatively permanent elevation or acclivity at the outer line of the riverbed which separates the bed from the adjacent upland, whether hill or valley, and serves to confine the waters when they reach and wash the bank without overflowing it. Oklahoma v. Texas, 260 U.S. 606 (1923). It is, therefore, concluded that the call to the west bank must be taken to mean the line of ordinary high water as it existed in 1876.

In determining the location of a boundary, when the United States has not conveyed its title to the abutting lands, it may survey and resurvey what it owns and establish and reestablish boundaries. United States v.

State Investment Co., 264 U.S. 206 (1924). The record discloses that all the lands outside the reservation boundary in this reach are owned by the United States and are under the jurisdiction of the Department of the Interior. The lands inside the boundary are owned by the United States in trust for the Colorado River Indian Tribes. No private ownerships are involved. In 1879, W. F. Benson established a meander corner common to sections 25 and 36, T. 2 S., R. 23 E., S.B.M., at a point on the west bank of the Colorado River which also fell on the line between the highest point on Riverside Mountain and the place of beginning. In these circumstances, as a matter of administrative convenience, it may be determined that the reservation boundary can and should be reestablished as a line between the highest point of Riverside Mountain and the meander corner common to the aforesaid sections 25 and 36. This line is sustained by adequate evidence of the proper location of the boundary as described in the Executive Order of May 15, 1876.

Location of the Boundary from Section 25, T. 2 S., R. 23 E., through Section 12, T. 5 S., R. 23 E., S.B.M.

From the point where the line from Riverside Mountain intersects the bank of the river, as described above, the second segment of the boundary should follow downstream along the bank of the river at the line of ordinary high water as it existed at the time of the issuance of the Executive Order of May 15, 1876, to the south boundary of section 12, T. 5 S., R. 23 E., S.B.M., subject to the application of the doctrine of erosion and accretion and avulsion to any intervening changes. Oklahoma v. Texas, supra.

With regard to such intervening changes, when the banks of a river change gradually and imperceptibly, the process is called erosion and accretion and a riparian owner's boundary will remain the same. In cases where a river suddenly abandons its old bed and seeks a new course, the change is termed an avulsion and a riparian owner's boundary will become fixed and permanent along the line of the former channel. Nebraska v. Iowa, 143 U.S. 359 (1892).

The Executive Order of May 15, 1876, which included lands located east of the west bank of the river, would operate as to all those lands not previously disposed of by the United States, as unquestionably the President had the power to reserve the lands by Executive Order. Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942); United States v. Midwest Oil Co., 236 U.S. 459 (1915). A portion of the west half of the riverbed, however, was owned at that time by the State of California because the Colorado River has been held to be a navigable stream in the reach here under consideration. Arizona v. California, et al.,

283 U.S. 423 (1931). The soil beneath navigable waters was not granted by the original states under the Constitution to the United States but was reserved to the States. Pollard v. Hagan, 44 U.S. (3 How.) 212 (1845). Upon the admission of a new State into the Union on an equal footing it acquires all the rights of the original States which, it has been held, includes title to the lands underlying navigable waters. Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867). The extent of the ownership acquired by the States upon admission is the soil below ordinary high-water mark. Mobile Transp. Co. v. City of Mobile, 187 U.S. 479 (1903). Thereafter, where a navigable stream is a boundary a riparian owner's title will extend to low or high-water mark or to the center of the stream according to the law of the State in which it is situated. Packer v. Bird, 137 U.S. 661 (1891). The United States like any other riparian owner takes such title to submerged lands as may be conferred by State action. Donnelly v. United States, 228 U.S. 243 (1913).

In 1873, California enacted a law, now codified as Civil Code § 830, which had the effect of granting to riparian owners on nontidal navigable waters ownership of the soil to low-water mark. It therefore follows that in those areas where the United States owned the uplands, it gained title under State law to the low-water mark. 43 Cal. Ops. Atty. Gen. 291 (1964); Crews v. Johnson, 21 Cal. Rptr. 37 (1962). It is concluded, therefore, that at the time of issuance of the Executive Order of May 15, 1876, the United States owned the area between ordinary high-water mark and low-water mark except in those areas where it may have previously disposed of lands abutting the ordinary high-water mark. The record discloses, however, that in 1876 the United States owned all the lands abutting the west bank of the Colorado River from the above-mentioned section 25, T. 2 S., R. 23 E., south through section 12, T. 5 S., R. 23 E.

In issuing the Executive Order of May 15, 1876, the United States effectively severed that portion of the lands between the high and low-water marks by including them in the reservation, thus, effectively segregating these lands from public lands lying to the west thereof. It must be concluded that the Executive Order was effective to reserve any lands within the river then owned by the United States as such order clearly intended that the river be included in the reservation.

Thereafter, accretions forming against this shoreline to the east thereof would be lands held in trust for the Colorado River Indian Tribes in those areas where the river has moved to the east by the normal process of erosion and accretion. Similarly, in those areas where the river has moved to the west by the normal process of

erosion and accretion, any accretions forming on the east side of the river are owned by the United States in trust for the Colorado River Indian Tribes.

In possible conflict with the reservation boundary, as hereinabove set out, are three tracts of school lands, these being sections 36 in Tps. 2, 3, and 4 S., R. 23 E. While the Act of Congress which granted California its school lands was passed in 1853, 10 Stat. 244, 246, title to such lands does not pass until they are surveyed. United States v. Morrison, 240 U.S. 192 (1916). Moreover, title to the school lands thus granted was expressly subject to reservations created prior to survey. 10 Stat. 244, 246. These three sections 36 were surveyed in 1879. All three were fractional sections abutting the meander line run as part of the survey.

It is the general rule that a meander line is not a line of boundary but one used to delineate the sinuosity of the bank or shore as a means of ascertaining the quantity of land in a fractional lot, the boundary line being the water itself. St. Paul and Pacific R. Co. v. Schurmeier, 74 U.S. (7 Wall.) 272 (1869). Thus, the Department has held on numerous occasions that grants by the United States of lands shown on plats of survey as adjoining navigable waters are not limited to the meander line but extend to the water line. Harvey M. La Follette, 26 L.D. 453 (1898). John J. Serry, 27 L.D. 330 (1898). Gleason v. Pent, 14 L.D. 375 (1892). Louis W. Pierce, 18 L.D. 328 (1894). While this rule has been applied in cases involving the issuance of a patent, the certification of lands (such as school lands) is equivalent to patent and divests the Department of all jurisdiction over the lands or title thereto. Frasher v. O'Connor, 115 U.S. 102 (1885). Smith v. Portage Lake and Superior Ship Canal Co., 11 L.D. 475 (1890). State of California v. Moody, 9 L.D. 635 (1889).

Against this background, it can be expected that the State or its successors in interest might claim title to accretions to these three school sections. However, as above noted, title to these lands was expressly subject to reservations created prior to the survey thereof. Inasmuch as the Executive Order of May 15, 1876, effectively segregated the shoreline from these fractional sections 36 by including it in the reservation, it is concluded that accretions to this shoreline are lands held in trust for the Colorado River Indian Tribes and that they did not attach to the three fractional sections 36 as surveyed in 1879. For these reasons, correction surveys approved in 1964 which apportioned accretion lands to sections 36, Tps. 3 and 4 S., R. 23 E., should be suspended and the accretion surveys of these townships approved in 1962 should be reinstated in their entirety.

There are also three parcels of School Indemnity Lands in sections 1 and 12, T. 5 S., R. 23 E., selection of which was approved in 1926. All three parcels abutted the meander line as surveyed by O. P. Calloway in 1874. Congress had previously authorized Lieu Selections in California. 14 Stat. 218, 220. However, such Lieu Selections are limited to other lands of equal acreage. 26 Stat. 796. It may also be anticipated that the State or its successors in interest would claim accretions to these Indemnity parcels. The record discloses that, at the time California made its selection of these fractional lots, substantial accretions had previously formed between the meander line abutting these parcels and the course of the river. Since California was in any event limited to lands of equal acreage in making its Lieu Selections, it cannot be said that approval of these School Indemnity Lands carried accretions which had previously formed. To hold otherwise would mean that California acquired lands in excess of that which was permitted by law. This then, is an additional reason why the accretions would not have passed with title to the fractional lots. Of course, the rationale with regard to accretions to the school sections hereinabove discussed is equally applicable to the School Indemnity Lands in that the inclusion of the shoreline in the reservation prior to disposal of the fractional lots effectively segregated such shoreline from the abutting lands which the State eventually selected.

As mentioned above, the proper location of the boundary in the reach from section 25, T. 2 S., R. 23 E., through section 12, T. 5 S., R. 23 E., is the line of ordinary high water along the west bank of the river at the time of issuance of the Executive Order of May 15, 1876, subject to application of the doctrine of erosion and accretion and avulsion. Absolute certainty as to the location of the bank in 1876 is probably not possible to achieve. However, in fixing the boundary, all that is required is such certainty as is reasonable as a practical matter, having regard to the circumstances. Arkansas v. Tennessee, 269 U.S. 152 (1925). The record discloses that the reach of the bank of the river from section 25, T. 2 S., R. 23 E., through T. 4 S., R. 23 E., was meandered in 1879 and that portion of the right bank in sections 1 and 12, T. 5 S., R. 23 E., was meandered in 1874. These meander lines were reestablished in a dependent resurvey made by the Bureau of Land Management in 1958.

As noted above, in 1876 the United States owned all the lands abutting the river on the west from the above-mentioned section 25, T. 2 S., R. 23 E., south through section 12, T. 5 S., R. 23 E. Also, the record indicates the present course of the river in this reach is now along or east of its position as surveyed in 1874 and 1879, except in two insignificant respects. The record also discloses that the lands presently lying between the meander lines of 1874 and 1879 and

the right bank of the river were formed by accretion. Since the bulk of the lands abutting these meander lines on the west are presently owned by the United States and those lands in non-federal ownership located to the west of the meander lines are not entitled to accretions as against the United States in any event, these meander lines may be adopted as the boundary of the reservation as a matter of administrative convenience. Only lands of the United States under the jurisdiction of the Department of the Interior are involved. Considering the nature of surveys in isolated areas and the limits of accuracy which could be achieved with equipment available nearly 100 years ago, it is concluded that these lines are adequate evidence of the proper location of the reservation boundary as they are reasonable as a practical matter, having regard to the circumstances. Arkansas v. Tennessee, supra.

In summary, it is concluded that in those areas where the United States has not conveyed its title to the lands abutting the reservation, it may survey and resurvey what it owns and establish and reestablish boundaries. United States v. State Investment Co., supra. The United States may make or correct its surveys and such are not assailable in the courts, except in a direct proceeding. Cragin v. Powell, 128 U.S. 691 (1888). Therefore, in the above-mentioned areas, it is concluded the determination of the reservation boundary as herein made is not subject to collateral attack. As to those areas where the lands abutting the reservation boundary are in non-federal ownership, it may be expected that litigation will be necessary to extinguish claims of others which are adverse to those of the Colorado River Indian Tribes.

cc:
Commissioner of Indian Affairs (2)
Regional Solicitor, Los Angeles
Director, Bureau of Land Management (2) (detached)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; I am employed in the office of a member of the bar of this Court at whose direction the service was made; my business address is 1111 Sunset Boulevard, Los Angeles, California 90012.

On November 4, 1981, I served the within

FIRST AMENDED COMPLAINT FOR REVIEW OF ADMINISTRATIVE ACTION, FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

on the interested parties in said action by placing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Patrick Barry
Department of Justice
Room 1748
Indian Resources Section
18th and Pennsylvania Ave., N.W.
Washington, D.C. 20530

Stephen V. Petix
Asst. U.S. Attorney
United States Attorney's Office
United States Courthouse
Room 5-N-19
San Diego, CA 92189

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 4, 1981, at Los Angeles, California.

Estela Mangan

ESTELA MANGAN

Carl Boronkay, General Counsel
Warren J. Abbott, Assistant General Counsel
Karen L. Tachiki, Deputy General Counsel

Attorneys for The Metropolitan Water
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California, Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior, Defendants.	CIV. ACTION NO. 81-0678-GT(M) PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; I am employed in the office

of a member of the bar of this Court at whose direction the service was made; my business address is 1111 Sunset Boulevard, Los Angeles, California 90012.

On November 5, 1981, I served the within

FIRST AMENDED COMPLAINT FOR REVIEW OF ADMINISTRATIVE ACTION, FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

on the interested parties in said action by placing two true copies thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Patrick Barry
Department of Justice
Room 1748
Indian Resources Section
10th and Pennsylvania Avenue, N.W.
Washington, D. C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 5, 1981, at Los Angeles, California.

Estela Mangan

ESTELA MANGAN

WILLIAM H. KENNEDY
United States Attorney

STEPHEN V. PETIX
Assistant United States Attorney
United States Courthouse
940 Front Street
San Diego, California 92189
Telephone: (714) 293-5610

SCOTT B. McELROY
F. PATRICK BARRY
Department of Justice
Land and Natural Resources Division
10th & Pennsylvania Avenue, N.W.
Washington, D.C. 20530
Telephone: (202) 633-3248, 633-2045

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior. Defendants.	CIVIL NO. 81-0678-GT(M) UNITED STATES' MOTION TO DISMISS

Defendants, the United States of America and the Secretary of the Interior, by and through their undersigned attorneys, respectfully move this Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss Plaintiffs' Amended Complaint for the reasons set forth in the attached Memorandum in Support.

Respectfully submitted this 19th day of February, 1982.

SCOTT B. McELROY
Attorney, Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

F. PATRICK BARRY
Attorney, Department of Justice
Land and Natural Resources Division
Washington, D.C. 20530

Of Counsel:

William H. Swan
Office of the Field Solicitor
Phoenix, Arizona

Form CBD-183
12-8-76 DOJ

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior. Defendants.	CIVIL NO. 81-0678-GT(M) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

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Form OBD-183
12-8-76 DOJ

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior. Defendants.	CIVIL NO. 81-0678-GT(M) MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I

INTRODUCTION

Plaintiffs Metropolitan Water District (hereinafter M.W.D. or Metropolitan) and Coachella Valley Water District (hereinafter Coachella) have instituted this litigation to challenge the inclusion of certain lands within the boundaries of the Ft. Yuma,[1/]

1/ The Ft. Yuma Reservation is inhabited by the Quechan Tribe and is frequently referred to as the Quechan Reservation.

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Ft. Mojave and Colorado River Indian Reservations. Neither plaintiff claims any interest in the land alleged to be wrongfully included within the reservation boundaries. Instead, plaintiffs assert that if portions of such lands are found to be entitled to reserved water rights in the ongoing proceedings in Arizona v. California, No. 8 Original, U.S. Supreme Court, and those rights are actually put to use, and if California users are ultimately restricted to 4.4 million acre-feet of water from the Colorado River, less water may be available to satisfy plaintiffs' rights.

As plaintiffs appear to recognize, on these reservations only those lands held in trust for the use of the Indian inhabitants are entitled to reserved water rights. See Arizona v. California, 373 U.S. 546 (1963), 376 U.S. 340, at 345 (1964). Thus, the crucial issue relative to the challenged boundaries is the subsequent treatment of the land within those boundaries as trust land.[2/] But plaintiffs claim no interest whatsoever in the affected lands. Accordingly, plaintiffs lack standing to invoke the jurisdiction of this Court to challenge the reservation boundaries. Nor can they look to the Administrative Procedure Act, 5 U.S.C. 701-706 for relief for they have suffered no legal wrong and are not "adversely affected or aggrieved by agency action within the meaning of a relevant statute" 5 U.S.C. 702. Moreover, the United States has not otherwise waived its sovereign immunity in connection with actions such as this. At any rate, the plaintiffs have not joined

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2/ Not all land within the newly recognized boundaries is considered to be in "trust status". See, e.g., Secretarial Orders of December 20, 1978, Exhibit 2 to the Amended Complaint.

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the States of California and Arizona, both of which are indispensable parties to this action. Finally, in connection with the Secretarial orders affecting the Ft. Mojave and Colorado River boundary, the statute of limitations has run. These faults warrant dismissal of this action.

II

STATEMENT OF CASE

Metropolitan and Coachella filed their Complaint on July 21, 1981, and an Amended Complaint was filed in November, 1981. The Amended Complaint attacks three decisions issued by the Secretary of the Interior[3/] determining the boundaries to the Quechan, Ft. Mojave, and the Colorado Indian Reservations (hereinafter, when referred to collectively, "the Indian reservations").[4/] In addition to disputing the expansion of the boundaries, plaintiffs allege that the United States' claims of ownership of certain lands within those boundaries, including portions of the bed of the Colorado River, are incorrect. Plaintiffs request the Court (1) to order a revocation of the three Secretarial orders determining the boundaries of the three reservations, (2) to establish the boundaries as plaintiffs claim is correct, and finally (3) to

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3/ Copies of the Secretarial orders and opinions by the Solicitor, in support thereof, setting the boundaries for the Quechan, Ft. Mojave, and Colorado River Indian Reservations, are attached as Exhibits 2, 7, and 11 to Plaintiffs' Amended Complaint.

4/ The three decisions (Quechan, 1978; Ft. Mojave, 1974; and Colorado River, 1969), in essence found that earlier decisions setting the boundaries for the three Indian reservations were in error and declared that new boundaries should be set.

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prohibit the use of Colorado River water on those lands found to be outside of the previously recognized boundaries of the reservations.[5/]

Plaintiffs' interest in these boundary determinations is remote. Nowhere in their Complaint do they allege an interest in the lands asserted to have been erroneously included within the three reservations. Indeed, they claim that the ownership of a substantial portion of the area allegedly erroneously treated as reservation lands is with the States of Arizona and California, neither of which is a party to this litigation. Instead of asserting an interest in the affected lands, M.W.D. and Coachella assert merely that the determination of the boundaries may ultimately affect the amount of water available to satisfy their water rights.

At present, M.W.D. holds the fourth and fifth priority to waters available to use in California pursuant to the decree in Arizona v. California, 376 U.S. 340 (1964).[6/] The priorities of certain California diverters were set by the Secretary of the Interior in the 1931 General Criteria and in the contracts executed with each of the diverters. Under the fourth priority Metropolitan

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5/ We assume plaintiffs merely seek to have the affected Indian tribes foreclosed from using water on such land and not to foreclose the use of any Colorado River water on these lands.

6/ The Supreme Court in dividing the waters of the lower Colorado River between Arizona, Nevada and California, limited California's appropriation to 4,400,000 acre-feet of water per year. In addition, under certain conditions, California is entitled to 1/2 of any surplus. See Arizona v. California, supra, 376 U.S. at 342.

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is entitled to 550,000 acre-feet of water per year for use on the coastal plain of Southern California. The fifth priority entitles Metropolitan to 662,000 acre-feet of water, also for use on the coastal plain of Southern California. Metropolitan alleges that when California is restricted to 4.4 million acre-feet of water per year, it will only be entitled to divert 550,000 acre-feet per year. See Amended Complaint, paragraph 23.

Coachella is entitled to receive water under the third priority. Pursuant to an agreement of compromise dated February 14, 1934, Coachella conceded the Imperial Irrigation District a priority to the third priority. See Amended Complaint, paragraph 24.

The United States also holds water rights from the Colorado River in trust for the Quechan, Ft. Mojave and Colorado River Indian Tribes. See Arizona v. California, 373 U.S. 546, 595-601 (1963); 376 U.S. 340, 343-346 (1964); 439 U.S. 419, 423, 428, 436 (1979). Such rights are senior to virtually all other rights on the Colorado River including those held by Coachella and M.W.D. In December, 1978 the United States filed a motion in the Supreme Court to modify the 1964 decree to increase the allocation of water available for use on the five Indian reservations along the lower Colorado River. The motion seeks additional water for lands within the areas previously recognized as part of the reservation but for which no water was claimed in the earlier proceedings. The second portion of the United States' claim is for lands once treated as outside of the reservation boundaries but now determined to be within their true boundaries. The affected Tribes had previously

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sought to intervene to assert similar claims and those motions, as well as the United States' motion, were referred to a Special Master. Arizona v. California, 439 U.S. 419, 436-37 (1979); 440 U.S. 942 (1979). The issues have been submitted to the Master and his report is due shortly.

At present it is uncertain whether the Master, let alone the Supreme Court, will grant additional water rights to the United States for use on lands within the areas disputed as part of the reservations here.

The plaintiffs are challenging the boundaries of Ft. Yuma, Ft. Mojave, and Colorado River Reservations.

The Ft. Yuma Reservation was created by Executive Order on January 9, 1894, I Kappler, Indian Affairs, Laws and Treaties p. 832. On December 20, 1978, the Solicitor of the Department of the Interior issued an opinion on the boundaries of this reservation. See Exhibit 3 to the Amended Complaint. His view differed from two previous opinions. On December 20, 1978, the Secretary of the Interior issued an order consistent with the Solicitor's opinion. That order expressly noted the continuing viability of third party interests within the external boundaries of the reservation. In 1981 the Secretary issued another order which recognized all such interests within the reservation. A survey of the boundaries was also ordered. The plat was entered on February 20, 1980, and on January 20, 1981.

The Camp Mojave Military and Hay and Wood Reserve was created by an Executive Order on March 30, 1870. General Order

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No. 19 of the War Department, dated August 4, 1870, defined its boundaries. An Executive Order dated September 19, 1880, transferred the Ft. Mojave Military Reservation and Hay and Wood Reserve to the Department of the Interior for use by the Ft. Mojave Indians. On June 3, 1974, the Secretary of the Interior determined that an earlier survey was erroneous. Exhibit 7 to the Amended Complaint. The Secretary's order was supported by a Solicitor's opinion.

The Colorado River Reservation was established by Act of March 3, 1865. 13 Stat. 541, 559. It was enlarged by Executive Order of November 22, 1873, and again by Executive Order of November 16, 1874. The November 16, 1874, order enlarged the reservation to include lands on the west side of the Colorado River in the State of California. Then, by Executive Order dated May 15, 1876, the western boundary of the reservation was determined to be the west bank of the Colorado River.

On January 17, 1969, the Secretary of the Interior determined that the correct western boundary of the reservation was a fixed boundary dependent upon the 1874 and 1879 meander lines as shown on the plats of survey approved December 28, 1874 and May 22, 1879. The Secretary's decision was supported by a Solicitor's opinion of the same date.

III

PLAINTIFFS ARE NOT ENTITLED TO JUDICIAL REVIEW OF THE RESERVATION BOUNDARIES

Plaintiffs' Amended Complaint challenges the Secretary's orders to resurvey the boundaries of the Quechan, Ft. Mojave and

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Colorado River Indian Reservations. Plaintiffs allege that the Secretary has unlawfully included as part of the three reservations, lands which the United States does not hold in trust for the benefit of the Indian inhabitants. The plaintiffs further allege that included within these lands are portions of the historic bed of the Colorado River and that those portions are owned by the States of California and Arizona. Jurisdiction to attack the disputed Secretarial actions is claimed under 28 U.S.C. 1331 and the Administrative Procedure Act, 5 U.S.C. 701-706 (APA). Plaintiffs' challenge, however, fails for lack of standing. Similarly the APA provides no basis for judicial review of the disputed actions.

We turn first to the statutes establishing the Secretary's authority to define the boundaries of the Quechan, Ft. Mojave and Colorado River Reservations. That authority is found in 25 U.S.C. 176 which declares that surveys of Indian reservations shall be under the "jurisdiction and control of the Bureau of Land Management and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed". 43 U.S.C. 751 and 752 establish general rules for the conduct of surveys. 43 U.S.C. 772 authorizes the resurvey of boundaries:

> The Secretary of the Interior may, as of March 3, 1909, in his discretion cause to be made, as he may deem wise under the rectangular system in that date provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of public lands remaining undisposed of: Provided, that no such resurvey or retracement shall be so executed as to impair the bona fide

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> rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement.

The courts have viewed this statute as a broad grant of authority stating that, "[p]rior to title passing from the United States, it is undisputed that the Government has the power to survey and resurvey, establish and reestablish boundaries on its own lands." United States v. Reimann, 504 F.2d 135, 138 (10th Cir. 1974); see also, United States v. State Investment Co., 264 U.S. 206 (1924).[7/]

A. Plaintiffs Lack Standing to Litigate the Issue of the Inclusion of the Disputed Lands in the Indian Reservations.

Plaintiffs claim no interest in any of the lands alleged to be erroneously included as part of the reservations.[8/] Accordingly, they lack standing to litigate the issue of the ownership of land claimed by the United States. Yet it is plain that it is the title question which concerns plaintiffs. The crux of the Amended Complaint is that recognition of the disputed boundaries may result in the recognition of additional reserved rights for the Indian tribes which inhabit the reservations. But for these reservations it is clear that such reserved rights attach only to lands which the federal government holds in trust for the Indian inhabitants. See Arizona v. California, supra, 376 U.S. at 345.

7/ The authority of the Department of the Interior with respect to public lands is well-established. United States v. Schurz, 102 U.S. 378, 395 (1880); Cragin v. Powell, 128 U.S. 691, 697-699 (1888); Knight v. United States Land Association, 142 U.S. 161, 177-178 (1891); Johanson v. Washington, 190 U.S. 179, 185 (1903); Lane v. Darlington, 249 U.S. 331, 333 (1919).

8/ The statutory waiver of the sovereign immunity of the United States for quiet title actions does not extend to lands held in trust for Indian tribes. See 28 U.S.C. 2409a.

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The traditional standing rules provide several key limits to the invocation of federal court jurisdiction. Those limits were recently described by the Supreme Court in Valley Forge Christian College v. Americans United for Separation of Church and State, 50 U.S.L.W. 4103, 4106 (January 12, 1982):

> Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing. Thus, this Court has held that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Warth v. Seldin, 422 U.S. at 499. In addition, even when the plaintiff has alleged redressable injury sufficient to meet the requirements of Art. III, the Court has refrained from adjudicating "abstract questions of wide public significance" which amount to "generalized grievances," pervasively shared and most appropriately addressed in the representative branches. Id., at 499-500. Finally, the Court has required that the plaintiff's complaint fall within "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Data Processing Service v. Camp, 397 U.S. 150, 153 (1969). (Footnotes omitted).

Plaintiffs cannot satisfy those standards. The well-established rule is that only holders of private rights affected by a resurvey may challenge that action. As the Supreme Court stated in Cragin v. Powell, 128 U.S. 691 (1888),

> . . . the power to make and correct surveys belongs to the political department of the government and that, whilst the lands are subject to the supervision of the General Land Office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding . . . .

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> The reason of this rule, as stated by Justice Catron in the case of Haydel v. Dufresne, is "that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinon that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."
>
> 128 U.S. at 699.

See also United States v. State Investment Company, 264 U.S. 206 (1924). The result is that plaintiffs who claim no interest in the lands affected by the questioned boundary decisions lack standing to litigate the issue of inclusion of the disputed lands within the reservations.

B. Plaintiffs Are Not Entitled to Judicial Review Under the APA.

Nor can plaintiffs bootstrap themselves into court on the basis of the APA. That legislation clearly defines those parties entitled to judicial review:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. 702.

Plaintiffs cannot satisfy this test.

The decision of the Ninth Circuit in Braude v. Wirtz, 350 F.2d 702 (9th Cir. 1965) discusses the question of standing for the invocation of judicial review under the APA. That case involved a challenge to administrative decisions affecting the eligibility of certain aliens to obtain visas to enter the United States. The aliens were joined by six agricultural corporations

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(the growers) as plaintiffs. The court's treatment of the standing of the growers who sought judicial review under the APA is instructive here. The growers argued that they had suffered a "legal wrong" within the meaning of the APA because "the practical effect" of the challenged decisions would detrimentally affect their ability to "effectively compet[e] with other businessmen in this labor force". The court refused to accept that allegation as a satisfactory basis for standing under the APA, stating:

> The phrase "legal wrong" under the Act means the invasion of a legally protected right. . . . Our inquiry then must be to determine if appellants have a legally protected right to be free of the effects ascribed to the administrative determinations. 350 F.2d at 707 (Citations omitted, emphasis in original.)

The court found plaintiffs' allegations of serious economic injury insufficient to support standing to sue.

A similar analogy in the present case reveals that plaintiffs cannot demonstrate any "legally protected right" in connection with the disputed administrative actions. Plaintiffs have no legal rights which are affected by the denomination of certain lands as trust lands. In fact, their legal rights remain precisely the same despite the disputed boundary decisions. Moreover their allegations of harmful practical effect are as insufficient here as were similar allegations to give them standing in Braude.

Plaintiffs likewise cannot satisfy the alternative test for APA standing as set out in Starbuck v. City and County of San Francisco, 556 F.2d 450, 457-458 (9th Cir. 1977):

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> The concept of "a person aggrieved" [as found in 5 U.S.C. 702] is a close relative of standing *** Claimants cannot be persons aggrieved unless "the challenged action had caused them" injury in fact, ". . . [and] the alleged injury was to an interest" arguably within the zone of interests to be protected or regulated" by the statutes that the agencies were claimed to have violated. (citations omitted.)

Plaintiffs have not suffered any injury in fact as a result of the recognition of the disputed boundaries. Plaintiffs allege that a potential diminishment of the water available to satisfy their water rights may result from the challenged actions. A number of assumptions underlie plaintiffs' assertions.

(1) They assume that the Tribes will be entitled to water rights permitting them to irrigate at least some of the lands encompassed within the challenged boundaries with priorities senior to those of plaintiffs.

(2) That all users with rights senior to those of the plaintiffs will put those rights to use in ensuing years.

(3) That California users will be limited to 4.4 million acre-feet per year sometime in the future.

(4) Finally, the Tribes must actually put to use all rights to which they may be entitled.

In sum, the disputed boundary decisions may, in connection with a series of other uncertain and unrelated events, lead to a decrease in the amount of water available to satisfy plaintiffs' legal entitlement. But such injury is remote at best and not susceptible to characterization as caused by the defendants' actions being challenged in this lawsuit. See Bowker v. Morton, 541 F.2d

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1347, 1349 (9th Cir. 1976) ("Plaintiffs may not rely on 'the remote possibility, unsubstantiated by allegations of fact that their situations . . . might improve were the court to afford relief."); Starbuck v. City and County of San Francisco, supra, 556 F.2d at 458 ("[A]ppellants cannot show the essential causal link between their injury and the Secretary's alleged inaction"). Indeed plaintiffs here cannot show that they will definitely be injured at all as a result of defendants' actions.

Even assuming arguendo that the injury to plaintiffs were sufficient to be considered an injury in fact, plaintiffs are not within the zone of interests protected by the statutes giving the Secretary authority to resurvey the questioned boundaries. As discussed above, the relevant statutes seek to protect parties whose claims to land may be affected by government surveys. The plaintiffs here do not satisfy that requirement. The result is that plaintiffs are not entitled to judicial review under the APA. They cannot claim that they have suffered any legal wrong or that they have suffered injury in fact and are within the zone of interests protected by relevant statutes. Accordingly, the APA provides no basis for judicial review here.

IV

THE SOVEREIGN IMMUNITY OF THE UNITED STATES BARS THIS LAWSUIT

A threshold question in any suit in which the United States is named as a defendant is whether Congress by statute has authorized the suit to be brought. The familiar rule is that

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the United States, as sovereign, is immune from suit unless it has consented to be sued. United States v. Sherwood, 312 U.S. 584, 586 (1941), Morris v. United States, 521 F.2d 872 (9th Cir. 1975). In the instant case since the plaintiffs may not evoke the APA as a waiver of sovereign immunity, plaintiffs are foreclosed from bringing suit.

The general rule is that relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter. Hawaii v. Gordon, 373 U.S. 57, 58 (1963); Dugan v. Rank, 372 U.S. 609 (1963); Malone v. Bowdoin, 369 U.S. 643 (1962); Larson v. Domestic and Foreign Commerce Corporation, 337 U.S. 682 (1949).

Metropolitan and Coachella seek specific declarations of the boundaries of the three Indian reservations, to enjoin the Secretary from delivering water to certain federal lands, and a declaration that certain lands are owned by the State of California. 9/ The relief sought is clearly against the United States although nominally against the Secretary. Larson v. Domestic and Foreign Commerce Corporation, supra, 337 U.S. at 687; Malone v. Bowdoin, supra; Dugan v. Rank, supra; City of Fresno v. California, 372 U.S. 627 (1963); State of Washington v. Udall, 417 F.2d 1310, 1317 (9th Cir. 1969). That being the case, the Secretary cannot be enjoined for treating the disputed lands as part of the Indian

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9/ Sovereign immunity would bar plaintiffs from litigating these issues in a quiet title action. 28 U.S.C. 2409a.

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reservations. Larson v. Domestic and Foreign Commerce Corporation, supra, is directly on point and controls the disposition of plaintiffs' claims especially insofar as Larson specifically overruled the earlier case of Goltra v. Weeks, 271 U.S. 536 (1926).

In a series of cases beginning with Larson v. Domestic and Foreign Commerce Corporation, supra, the Supreme Court has clarified the doctrine of sovereign immunity particularly with regard to actions in which the relief is nominally sought against a government officer. In Larson, the plaintiff brought suit against the head of the War Assets Administration alleging that the Administration had violated the terms of its contract by refusing to deliver certain coal to the plaintiff and entering into a contract to sell it to others. The prayer was for an injunction prohibiting the administrator from selling or delivering the coal to anyone other than the plaintiff and for a declaration that the sale to the plaintiff was valid and the sale to the second purchaser invalid. The Supreme Court held that such relief was barred by sovereign immunity since "the action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so 'illegal' as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers or their exercise in the particular case are constitutionally void." Larson, supra at 701-702.

In holding that the relief sought by the plaintiff in Larson was barred by the doctrine of sovereign immunity, the Court

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addressed itself to several questions which also appear in the instant case and hence merit discussion. First of all, the Court noted that the denomination of the party defendant by the plaintiff was not the sole test to determine whether a suit was against an officer individually or against his principal, the sovereign. "[T]he crucial question" the Court stated, "is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign." 337 U.S. at 687. As the Court explained:

> In each such case, the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign. For the sovereign can act only through agents and, when an agent's actions are restrained, the sovereign itself may, through him, be restrained.
>
> * * *
>
> In each such case the compulsion, which the court is asked to impose, may be compulsion against the sovereign, although nominally directed against the individual officer. If it is, then the suit is barred, not because it is a suit against an officer of the government, but because it is, in substance, a suit against the Government over which the Court, in the absence of consent, has no jurisdiction. 337 U.S. at 688.

Further, in emphasizing that it is the substance of the complaint and not its form which will be determinative, the Court held that:

> Since the sovereign may not be sued, it must also appear that the action to be restrained or directed is not the action of the sovereign. The mere allegation that the officer, acting officially, wrongfully holds property to which the plaintiff has title does not meet that requirement. True,

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> it establishes a wrong to the plaintiff. But it does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign. If he is exercising such powers, the action is the sovereigns and the suit to enjoin it may not be brought unless the sovereign has consented. 337 U.S. at 693.

The Court also rejected the argument that official action is invalid if based on an incorrect decision as to law or fact if the officer making the decision was empowered to do so, stating:

> We hold that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immunized from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign. 337 U.S. at 695.

The record in this case demonstrates that the facts which gave rise to this controversy mirror those which lead to Larson v. Domestic and Foreign Commerce Corporation.

First, M.W.D. and Coachella, like the plaintiff in Larson seek injunctive and declaratory relief. See Larson, supra, 337 U.S. at 684. Second, in this case as in Larson, the thrust of plaintiffs' complaint is that the officer is "wrongfully" holding property. Finally, plaintiffs here, like the plaintiff in Larson, are proceeding against the federal defendant on the theory that an action which is "wrongful" or "illegal" is, by definition, beyond the scope of that official's authority and subjects the official

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to suit. The Supreme Court found the theory to be erroneous. 337 U.S. at 692.

The upshot is that sovereign immunity forecloses this litigation against the United States. Although couched in the guise of review of secretarial action, plaintiffs here plainly seek to determine whether the federal government holds lands in trust for the Indian inhabitants of the three reservations. Thus, the action is against the United States and is barred by sovereign immunity.

V

THE FAILURE TO JOIN ARIZONA AND CALIFORNIA REQUIRES DISMISSAL OF PLAINTIFFS' SECOND, FOURTH AND SIXTH CLAIMS FOR RELIEF.

Assuming arguendo plaintiffs meet the test of 5 U.S.C. 702 or otherwise have standing and jurisdiction to challenge the Secretary's three orders, plaintiffs' second, fourth and sixth claims for relief must be dismissed since plaintiffs have failed to join the States of California and Arizona who are necessary and indispensable parties under Fed. R. Civ. P. 19.

A. The States of California and Arizona Are Necessary Parties.

Fed. R. Civ. P. 19(a) defines as necessary participants to a lawsuit those persons

> (1) . . . [in whose] absence complete relief cannot be accorded among those already parties, or (2) [those who claim] an interest relating to the subject of the action and is so situated that disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect his interest . . .

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The rationale is simply stated: "Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made." Notes of Advisory Committee, Rule 19, 1966 Amendment. See also, Schutten v. Shell Oil Company, 421 F.2d 869 (5th Cir. 1970).

In the present case plaintiffs have alleged facts which, if true, would conclusively demonstrate that the States of Arizona and California are necessary parties. Specifically in plaintiffs' second, fourth and sixth claims for relief, (paragraphs 32, 46, 70, 71, 74, 75, 94 and 95 of Plaintiffs' Amended Complaint), it is alleged that the United States is claiming land within the exterior boundaries of the three reservations (essentially the historic bed of the Colorado River) when such lands, according to plaintiffs, ". . . belong to the States of California and Arizona". But to state the obvious, if Arizona and California have claims to lands claimed by the defendant the two states have an interest in the outcome of any litigation that would determine title to those lands. Obviously, the two states cannot adequately protect their interests and the parties involved cannot hope for complete relief unless all those who have or claim an interest in these lands are joined. Wright and Miller, Federal Practice and Procedure 1621.

For this action to proceed both states must be present to assert their interests. The principle is well-established in property law that "whenever a party seeks to quiet title to a piece of land, he must join all known persons who are claiming

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title in order to settle the property's ownership without additional litigation". Wright and Miller, Federal Practice and Procedure 1621. See also, Reese v. Skelly Oil Company, 53 F.R.D. (S.D. Miss. 1971).

For the above stated reasons we submit that the States of Arizona and California are necessary parties to the instant case and pursuant to Fed. R. Civ. P. 19 should have been joined as parties by plaintiffs.

B. The States of California and Arizona Are Not Feasible Parties.

As discussed above, under Fed. R. Civ. P. 19 a necessary party must be feasible before the Court can order his joinder. A feasible party is one over whom the Court may assert personal jurisdiction and whose presence in the lawsuit would not destroy subject matter jurisdiction.

California and Arizona are not feasible parties under Fed. R. Civ. P. 19. The Eleventh Amendment clearly defines the limits to federal court jurisdiction over a state:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens of any Foreign State.

The Eleventh Amendment prohibits joinder of Arizona in this case, without its consent, since M.W.D. and Coachella are public agencies of the State of California with their principal place of business in California. Thus the suit would be "against one of the United States by citizens of another state". The

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Eleventh Amendment also bars suits against a state by its own citizens. See Eldemann v. Jordan, 415 U.S. 651 (1974). Hence, plaintiffs as citizens of California are foreclosed from obtaining jurisdiction over the State of California in federal district court as well.

The Court does not need to address the question of whether the two states may seek to intervene in this action since jurisdiction over conflicts between two states is reserved exclusively to the Supreme Court. 28 U.S.C. 1251.[10/] Accordingly, participation by the two states would preclude district court jurisdiction. At any rate, if the states were to intervene seeking to quiet title to certain lands, the sovereign immunity of the United States would bar the action. See 28 U.S.C. 2409a.

In sum the States of Arizona and California are necessary parties who cannot be joined, with or without their consent, in this action. Thus, pursuant to Fed. R. Civ. P. 19 the issue confronting the Court is whether "the action should proceed among the parties before it, or should be dismissed, the absent party being thus regarded as indispensable".

10/ The fact that the subject of this action is title to land and not a political boundary question is irrelevant for California v. Arizona, 440 U.S. 59 (1979) is considerable authority that such a question is of sufficient magnitude to make assumption of jurisdiction by the Supreme Court obligatory. See Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972).

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C. The States of California and Arizona Are Indispensable to this Action and Therefore Plaintiffs' Amended Complaint Should be Dismissed.

Fed. R. Civ. P. 19(b) sets out four factors to be considered in determining "whether in equity and good conscience the action should proceed. . . ." The factors which "it identifies . . . will be most significant in most cases". Wright and Miller, Federal Practice and Procedure 1608. The following analysis of the four factors listed in Fed. R. Civ. P. 19(b) in relation to this case demonstrates that Arizona and California are indispensable to the resolution of the second, fourth and sixth claims for relief and that those claims should be dismissed.

1. To What Extent a Judgment Rendered in the Person's Absence be Prejudicial to Him or Those Already Parties.

Here the United States and the States of California and Arizona will be prejudiced if the three claims were to proceed in the absence of the states. Trial of the case without the two states, who are alleged to own the lands in question ". . . they would not be bound by the judgment or decree of this Court, and the prospect of multiple litigation against the defendants is not only a real possibility, but a probability". Reese v. Skelly Oil Co., 53 F.R.D. 548, 563 (S.D. Miss. 1971). That case involved a claim by lessees of oil and gas leases against Skelly Oil to remove cloud of title. There the Court applied the well-established rule that all parties who have an interest in the land must be joined to avoid multiplicity of actions or the case must be dismissed. That rule applies here as well.

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2. The Extent to Which by Protective Provisions in the Judgment, by the Shaping of Relief or other Measures, the Prejudice can be Lessened or Avoided.

The issues to be litigated under the second, fourth and sixth claims for relief are land ownership. In challenging the United States' title to certain lands, plaintiffs have alleged that title lies in the States of California or Arizona. Any decree that this Court would fashion in the absence of the two States would be hollow indeed. As stated in Reese v. Skelly Oil Company:

> Inasmuch as this litigation revolves around and is based upon conflicting claims of ownerships, this Court is unable to envision any decree which would effectively settle any controversy between the plaintiff and defendants without doing substantial practical injury to the plaintiff's lessors [absent party's] unassertable claims . . . . Any attempts to render a judgment or decree which would lessen this practical harm would result in a meaningless decree as well as the reasonable probability of additional multiple and costly litigation and possibly conflicting decisions.

Reese v. Skelly Oil Company, supra, 53 F.R.D. at 563.

The parallel can be seen in the present action. Any decree that this Court issues is subject to subsequent attack by either California or Arizona; thus subjecting the United States to additional litigation and all parties to the possibility of inconsistent decisions.

3. Whether a Judgment Rendered in the Person's Absence will be Adequate.

By definition, it would seem clear that if this Court cannot fashion a remedy which is not subject to attack either by Arizona or California then that remedy would indeed be inadequate.

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4. Whether the Plaintiff will have an Adequate Remedy if the Action is Dismissed for Non-Joinder.

This consideration is irrelevant in the present instance since plaintiffs claim no interest in the disputed lands which are alleged to be owned by the absent states. Thus they simply are not entitled to any remedy. At any rate, plaintiffs' concerns may be satisfied if the two states, the alleged owners of the historic riverbed, determine that the claims now advanced on their behalf by plaintiffs are sufficiently meritorious to warrant litigation.

Conclusion

Rule 19 requires a three step analysis before a Court may dismiss an action. The first question is whether the absent party is necessary to the action; second, the second step is a determination whether joinder of the absent party is feasible; and finally, if joinder is not feasible, is the absent party indispensable. Where joinder of a necessary party is not feasible but the party is indispensable, the Court must dismiss. Here the States of California and Arizona are necessary parties, but their joinder is not feasible. Since, the absent parties are indeed indispensable the plaintiffs' second, fourth and sixth claims for relief must be dismissed.

VI

PLAINTIFFS' ACTION FOR REVIEW OF THE SECRETARY'S ORDERS FOR THE COLORADO RIVER AND THE FT. MOJAVE INDIAN RESERVATIONS ARE BARRED BY THE STATUTE OF LIMITATIONS.

The three Secretarial orders challenged in the instant action were issued on the following dates: Quechan, December 20,

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1978; Fort Mojave, June 3, 1974; and Colorado River, January 17, 1969. As stated above, plaintiffs filed their case on July 21, 1981.

The applicable Statute of Limitations provides that: "Every civil action commenced against the United States shall be barred unless the Complaint is filed within six years after the right of action accrues." 28 U.S.C. 2401. This statute applies with equal force to actions for review of agency action as well as to any other type of civil action against the United States. 11/ In

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11/ Examining precursors to 28 U.S.C. 2401, it is evident that Congress sought to be as broad as possible in considering which actions were subject to a statute of limitations:

> " . . . all claims . . . founded in the Constitution or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages whether liquidated or unliquidated, or other demands whatsoever in the part of the Government of the United States against any claimant against the Government in said court . . . shall [not] be allowed . . . unless the same shall have been brought within six years after the right accrued . . . . 36 Stat. 1093 (March 3, 1911).

The logical conclusion is that Congress' use of the phrase "civil action" in 28 U.S.C. 2401 was to be just as broad - so as to include all contingencies.

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Crown Coat Front Co. v. United States, 386 U.S. 503 (1976), the Supreme Court ruled that 28 U.S.C. 2401 is not a limit upon administrative action, but only upon "the right to file a civil action, in the courts against the United States." Id. at 511. The issue in that case centered upon when the "right of action" of which 2401 speaks accrues. In finding that ". . . the right of action first accrues when administrative action is final . . ." id. at 509, the Court clearly implied that if an action were filed for judicial review more than six years after final agency action, then the action would be barred by 28 U.S.C. 2401. This view was followed in Oppenheim v. Campbell, 571 F.2d 660 (D.C. Cir. 1978), where the court, in analyzing the government's claim that an action for judicial review was barred by the statute of limitations held that review was timely sought after final agency action. Again, the clear implication was that 28 U.S.C. 2401 would have been a bar, had review been sought more than six years after final agency action. 12/

In the present action, plaintiffs have failed to file in a timely fashion that portion of the Complaint which challenges the order of the Secretary dated January 17, 1969, concerning the

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12/ D.B. Ford, Inc. v. United States, 380 F.Supp. 1202, (D. Minn. 1974) could be read as suggesting a different conclusion, however. In that case the court stated "although this action was commenced by a civil complaint, as a review of the Commission's order it is in the nature of an appellate proceeding pursuant to 28 U.S.C. 2321-2325." Id. at 1208. Significantly, 28 U.S.C. 2321-2325 "are silent as to time limitations for the bringing of actions to review orders of the Commission." Id. at 1208.

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boundaries of the Colorado Indian Reservation. Likewise, they have failed to file in a timely fashion the portion of their Complaint challenging the 1974 order of the Secretary concerning the boundaries of the Ft. Mojave Reservation. More than six years have elapsed since the decision became final and therefore, 28 U.S.C. 2401 precludes the instigation of the claims for relief affecting those orders. For this reason, plaintiffs' third, fourth, fifth and sixth claims for relief should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 1982, I mailed postage prepaid a copy of the foregoing "UNITED STATES' MOTION TO DISMISS and MEMORANDUM IN SUPPORT THEREOF" to the following parties:

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Civil 81-0678-GT-M

RE: The Metropolitan Water Dist. etc., vs. The U.S.A. etc.

You are hereby notified that Order - Case be stayed pending the Supreme Court's final ruling on the Special Master's report, in each of the above-entitled cases was XX Filed and XX Entered.

Date Filed 4-29-82 Date Entered 4-30-82

XX Copy enclosed ____ Copy not enclosed

When the time for appeal has expired (without appeal being taken) counsel must arranged for pickup of their exhibits without further notice. Unless you respond within thirty days, they will be destroyed or otherwise disposed of pursuant to Local Rule 125-3.

I hereby certify that this notice was mailed on 4-30-82.

WILLIAM W. LUDDY, Clerk

By S Miller Deputy

S.Miller

APR 29 1982

APR 30 1982

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a public agency of the State of California and the COACHELLA VALLEY WATER DISTRICT, a public agency of the State of California, Plaintiffs, v. THE UNITED STATES OF AMERICA, JAMES WATT, as Secretary, United States Department of the Interior, Defendants.	Civil No. 81-0678-GT(M) ORDER

The court may find sua sponte that the case is not ripe for decision. Bergstrom v. Bergstrom, 623 F.2d 517, 519 n.1 (6th Cir. 1980). Since the plaintiffs are complaining primarily of the anticipated impact of events which are still uncertain, the court finds that this case is not ripe for decision. See, e.g., City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231 (9th Cir.), cert. denied, 449 U.S. 1039 (1980); Young v. Klutznick, 652 F.2d 617 (6th Cir. 1981), cert. denied, 71 L.Ed.2d 650 (1982).

No actual loss of water will occur before 1985, the projected date for commencement of delivery of mainstream water by the Central Arizona Project. The Special Master, appointed by the Supreme Court in Arizona v. California, 439 U.S. 419, 436-437 (1979), issued his report on February 22, 1982.

Exceptions to the Special Master's report and briefs will now be filed with the Supreme Court. Moreover, in light of the recent Supreme Court decision in Montana v. United States, 450 U.S. 544 (1981), the Secretary of Interior may change the boundary determination again before the anticipated loss of water occurs.

In order to protect the plaintiffs from possible statute of limitations problems, rather than dismissing the case, the court will stay all proceedings in this case pending the decision of the Supreme Court. The court reaches no issues other than the ripeness issue and expresses no opinion on the ultimate resolution of the merits of this controversy. The court does not reach the issue of whether the statute of limitations has run on any of the plaintiffs' claims.

Accordingly, it is ordered that all further proceedings be stayed in this case pending the Supreme Court's final ruling on the Special Master's report.

IT IS SO ORDERED.

Dated: April 28, 1982

Gordon Thompson Jr.

GORDON THOMPSON, JR., Judge
United States District Court

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